159

No. 09-1218

Supreme Court, U.S.
FILED
APR 8 - 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO ARGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL.,

Petitioners,

v.

MCWANE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Daniel J.T. Sciano
Counsel of Record
TINSMAN & SCIANO, INC.
10107 McAllister Freeway
San Antonio, Texas 78216
(210) 225-3121
dsciano@tsslawyers.com

Dawn B. Finlayson
THE GARDNER LAW FIRM
745 East Mulberry Avenue,
Suite 500
San Antonio, Texas 78212
(210) 733-8191
dbf@tglf.com

Jimmy M. Negem
NEGEM, BICKMAN & WORTHINGTON
440 South Vine Avenue
Tyler, Texas 75702
(903) 595-4466
jimmy@negembickhamlaw.com

Counsel for Petitioners

Dated: April 8, 2010

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroup.com

QUESTIONS PRESENTED

The Fair Labor Standards Act mandates covered employers to pay to employees minimum wage and overtime for hours of work. 29 U.S.C. §§ 206-207 (2006). Section 203(o) of the Act excludes from "hours worked" time spent "changing clothes or washing at the beginning or end of each workday" when such activities are "excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(o).

In its opinion, the Fifth Circuit specifically identified and discussed a conflict between the Third and Eleventh Circuits and the Ninth Circuit regarding the burden of proof to establish a "custom or practice" under a collective bargaining agreement. This Court has previously stated the elements of a custom or practice under a collective bargaining agreement, and Petitioners believe that the Fifth Circuit's opinion presents conflicts with that precedent and other intervening precedent.

The questions presented are:

I. What are the elements of proof to establish a "custom or practice" under a collective bargaining agreement, and which party, employer or employee, bears the burden of proof under Section 203(o)?

II. Whether the court of appeals below erred in holding that a Section 203(o) "custom or practice" was established on the undisputed facts of this record?

LIST OF PARTIES TO THE PROCEEDING

Due to the large number of parties involved in this case, a list of parties to the proceeding will be filed as a separate document.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS AND RULES 1

STATEMENT OF THE CASE 2

1. Background: This Court's Decision in *Alvarez* Established that Donning and Doffing Protective Gear Can Start the FLSA Continuous Workday 3

2. Plaintiffs' Claim 4

3. McWane's § 203(o) Motion 6

REASONS FOR GRANTING CERTIORARI 8

1. The Courts of Appeals are Irreconcilably Divided on the Construction of Section 203(o) of the FLSA 10

2. The Fifth Circuit's Decision Incorrectly Interpreted Section 203(o) of the FLSA 12

a. A Custom or Practice of Nonpayment Was Not Established as a Matter of Law 13

b. The Importance of Section 203(o) to the American Workforce Compels Resolution by this Court 18

c. The Scope of What Can Be Bargained For is Relevant to Determining Whether a "Custom or Practice" Exists as a Matter of Law 20

CONCLUSION 22

APPENDIX

Published Opinion of
The United States Court of Appeals
For The Fifth Circuit
entered January 8, 2010 .....App. 1

Judgment of
The United States Court of Appeals
For The Fifth Circuit
entered January 8, 2010 ..... App. 22

Judgment of
The United States District Court
For The Eastern District of Texas
entered September 24, 2008 ..... App. 24

Report and Recommendation of
The United States District Court
For The Eastern District of Texas
entered August 25, 2008 ..... App. 26

Exhibit 2 to
Plaintiffs' Response in Opposition to
Defendant's Motion for Summary
Judgment
entered September 14, 2007:

Declaration of Dennis W. Jackson
dated September 12, 2007 .... App. 40

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Cagle's Inc.,
488 F.3d 945 (11th Cir. 2007), *cert denied*,
128 S. Ct. 2902 (2008) 15

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 15

Detroit & Toledo Shore Line R.R. Co. v.
United Transp. Union,
396 U.S. 142 (1969) ..... *passim*

Figas v. Horsehead Corp.,
2008 WL 4170043 (W. D. Pa.) 16

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005) ..... *passim*

Idaho Sheet Metal Works, Inc. v. Wirtz,
383 U.S. 190 (1966) 11

Kassa v. Kerry, Inc.,
487 F. Supp. 2d 1063 (D. Minn. 2007) 16

Steiner v. Mitchell,
350 U.S. 247 (1956) 3, 19

Transportation Union v.
Union Pacific R. Co.,
385 U.S. 157 (1966) 11

Turner v. City of Philadelphia,
262 F.3d 222 (3d Cir. 2001) 15

Valladon v. City of Oakland,
2009 WL 3401263 (N.D. Cal.) 17

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 5

29 U.S.C. § 203(o) ..... *passim*

29 U.S.C. § 216(b) 6, 20

RULES

S. Ct. R. 10(a) 8

S. Ct. R. 10(c) 9

Fed. R. Civ. P. 54(b) 8

Fed. R. Civ. P. 56(c) 2, 15

REGULATION

29 C.F.R. § 1910.132(a) 19

OTHER AUTHORITY

Bureau of Labor Statistics,
Union Members in 2008, at 5 (Table 1),
http://www.bls.gov/news.release/pdf/union2.pdf 18

PETITION FOR WRIT OF CERTIORARI

Petitioners Corline Allen, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is published at 593 F.3d 449. Pet. App. 1.[1] The opinion of the district court and the report and recommendation of the magistrate judge are unpublished. Pet. App. 24 and 26.

JURISDICTION

The Fifth Circuit issued its opinion and judgment in this case on January 8, 2010. A petition for a writ of certiorari was filed on April 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

Section 203(o) of the Fair Labor Standards Act ("FLSA") reads:

> (o) Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing

---

[1] All references to "Pet. App." are to the appendix filed by Petitioners.

> clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o) (2006).

Rule 56(c), Fed. R. Civ. P. (2006), requires a district court to grant summary judgment when the pleadings and evidence "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

Two thousand one hundred fifty employees, working at steel foundries in ten states, seek unpaid overtime from their employer. For many years, their employer has required petitioners to spend significant time each day donning and doffing personal protective gear and completing other activities, but the employer did not compensate them for the time. A large majority of the employees are covered by collective bargaining agreements made with their employer. This appeal involves the employee petitioners' claim for compensation and the employer respondent's invocation of Section 203(o) of the FLSA, a provision of the Act addressing collective bargaining, to avoid payment for time spent donning and doffing personal protective gear.

1. Background: This Court's Decision in *Alvarez* Established that Donning and Doffing Protective Gear Can Start the FLSA Continuous Workday.

On November 8, 2005, this Court issued its decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), holding that the portal-to-portal provisions of the FLSA did not bar payment for donning and doffing of protective gear when such protective gear was "integral or indispensable" to a "principal activity." *Id.* at 35-37.

Reiterating its holding in *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956), this Court stated that:

> [A]ctivities, such as the donning and doffing of specialized protective gear, that are performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by [the portal-to-portal provisions].

Alvarez, 546 U.S. at 30.

Most significantly, however, *Alvarez* clarified, for the first time, that donning and doffing protective gear can start and stop the compensable "continuous

workday" under the FLSA. *Id.* at 37 ("Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA.").

2. Plaintiffs' Claim.

Plaintiffs are 2,150 named and opt-in claimants who are hourly workers at ten McWane, Inc. cast iron pipe and fitting foundries across the United States. *See* Pet. App. 2-3 (identifying locations and collective bargaining agreement periods).

Foundries require a high degree of precaution to operate safely. One such precaution is personal protective equipment worn by employees.

The Plaintiffs here don and doff personal protective equipment, as expressly required by McWane, Inc. company policy, procedures and rules and as required by law, which can include:

> Hard hats, earplugs, safety glasses with side shields, prescription safety glasses with side shields, gloves, aprons, rain gear, paper suits, rubber steel-toed boots, steel-toed boots or steel-toed shoes with metatarsal guards, heat jackets, flame-resistant jackets, disposable coveralls, face shields, spats, back braces, wrist braces, aluminized

> clothing and metatarsal shoes, paper masks, flame retardant hoods, flame retardant sleeves, flame retardant leggings, cutter shirts, respirators, helmets, and chaps.

Pet. App. 42.[2]

The 2,150 Plaintiffs have not been paid for donning and doffing required personal protective equipment. Nor have they been paid for any other preliminary or postliminary activity in between donning or doffing and their designated shift time.

This Court's decision in *Alvarez* in 2005 gave Plaintiffs notice for the first time that their donning and doffing required personal protective equipment and other preliminary and postliminary activities may be compensable as part of the FLSA continuous workday. Pet. App. 42.

On April 13, 2006, Plaintiffs filed this cause of action, seeking payment for their hours worked, and specifically seeking payment for work preliminary and postliminary to shift time as integral and indispensable to a principal activity and part of the continuous workday. Pet. App. 3. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (2006).

---

[2] The exact personal protective equipment worn varies depending on job responsibility. However, all Plaintiffs don at least hard hats, steel-toed boots, safety glasses, and ear plugs. Pet. App. 3. Numerous Plaintiffs, particularly those engaged in pouring and forming, don full body protection. There is no evidence in the record as to exactly how many employees are required to don and doff more than the minimum personal protective equipment, but it is known to be significant.

Plaintiffs requested certification of a collective action pursuant to 29 U.S.C. § 216(b) (2006), and the request was conditionally granted by the district court on November 7, 2006. *Id.*

3. McWane's § 203(o) Motion.

On August 23, 2007, McWane, Inc. ("McWane") filed its First Motion for Summary Judgment pursuant to 29 U.S.C. § 203(o) ("§ 203(o) motion").[3] McWane alleged that it had proven a "custom or practice [of nonpayment] under a bona fide collective-bargaining agreement" as a matter of law, and therefore, the portion of Plaintiffs' claim regarding "clothes changing" time was not compensable under the FLSA.[4]

---

[3] A small number of Plaintiffs are not covered by a collective bargaining agreement. They are not subject to dismissal under Section 203(o) and they are not participating in the instant appeal.

[4] Donning and doffing personal protective equipment is "clothes changing" under the precedent of the Fifth Circuit, which is also the position taken by the Department of Labor, and Plaintiffs do not contest that issue. Pet. App. 9.

In the motion and subsequent pleadings,[5] the parties did not dispute the following three facts, which proved dispositive to the lower courts:

a. Plaintiffs have not been paid for time spent donning and doffing personal protective equipment at the beginning and end of their work shifts. Pet. App. at 4, 41-43.

b. With respect to the dates when Plaintiffs are claiming hours worked, the applicable collective bargaining agreements are silent on the issue of whether time spent donning and doffing personal protective equipment is compensable. Pet. App. at 4, 41-43.

c. Payment for donning and doffing personal protective equipment was never discussed by Plaintiffs in union or employee meetings or with McWane managers, including meetings in which the applicable collective bargaining

---

[5] The issues of whether donning and doffing the personal protective equipment here are "integral and indispensable" to a "principal activity" or otherwise "work," to the extent those avenues remain open to challenge, do not concern the Court in reviewing this summary judgment, which is limited to Section 203(o). The fact that the activities in question are "hours worked" within the meaning of the FLSA must be presumed at this stage, as the motion for summary judgment merely asserts Section 203(o)'s exclusion from otherwise compensable time.

agreements were negotiated. Pet. App. at 4, 41-43.

On August 25, 2008, the magistrate judge issued his report and recommended that the § 203(o) motion be granted. Pet. App. 26-39. On September 24, 2008, the district court overruled Plaintiffs' objections to the magistrate judge's report and recommendation, adopted the recommendations in full, and entered a judgment pursuant to Fed. R. Civ. P. Rule 54(b). Pet. App. 24-25. Plaintiffs appealed, and the court of appeals affirmed the judgment of the district court. Pet. App. 22-23.

REASONS FOR GRANTING CERTIORARI

This case provides the Court an opportunity to address a conflict between the circuits regarding the proof of an exemption or exclusion under Section 203(o) of the Fair Labor Standards Act and a conflict with its own precedent regarding the proof of a "custom or practice" under a bona fide collective bargaining agreement generally.

a. The courts of appeals are divided on whether Section 203(o) is an avoidance provision, and thus an affirmative defense to be proven by an employer seeking an exemption from FLSA liability, or whether Section 203(o) is to be considered as an exception to the Act, and thus subject to the traditional burden of proof of the plaintiff. Rule 10(a), Rules of the Supreme Court.

b. The court of appeals below decided an important federal question in a way that conflicts

with relevant decisions of this Court. Rule 10(c), Rules of the Supreme Court. The Fifth Circuit's decision reflects a broad confusion in the lower courts over what constitutes a "custom or practice" under a collective bargaining agreement for the purposes of Section 203(o)'s exclusion from compensation. Specifically this Court has held that three elements are necessary to establish a custom or practice under a bona fide collective bargaining agreement as a matter of law: (1) time, (2) knowledge, and (3) acquiescence. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969). The court of appeals abolished the latter two elements of this holding for defendants asserting customs or practices of nonpayment under FLSA Section 203(o). Pet. App. 16-17.

The court of appeals' judgment also calls into question the extent to which an alleged FLSA custom or practice of nonpayment may be maintained subsequent to an intervening decision of this Court, such as *Alvarez*, which alters the legal rights of employees and changes the scope of the FLSA continuous workday. An employee's decision whether to acquiescence to nonpayment for pre- and post-shift activities will likely differ after the scope of potentially compensable activities is enlarged, and it is not the court of appeals' place to make that choice for them by abolishing the defendant's obligation to prove the elements of knowledge and acquiescence.

1. The Courts of Appeals are Irreconcilably Divided on the Construction of Section 203(o) of the FLSA.

The Fifth Circuit expressly acknowledged the split between the circuits regarding the proper construction of Section 203(o) in its opinion. Pet. App. 18-20 (collecting and discussing the cases).

Section 203(o) provides that time spent in clothes changing is not to be included as work time for the purposes of the Act if a "custom or practice" nonpayment for the time has arisen under a bona fide collective bargaining agreement. If Section 203(o) is applied in this appeal to the employee petitioners, they cannot claim compensation for the time spent donning and doffing their personal protective gear. The proof of labor/management understandings related to clothes changing is at issue.

> A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts, which control such private contracts. It is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

Transportation Union v. Union Pacific R. Co., 385 U.S. 157, 160-161 (1966).

The collective bargaining agreements here contain no express terms regarding compensation for donning and doffing personal protective equipment, and the Court is not called upon to interpret the agreements themselves. Rather, the issue is whether a "custom or practice" of nonpayment has been established and exists outside the four corners of the agreements, under the "common law" of the McWane foundries in this case.

The Fifth Circuit joining the Third and Eleventh Circuits, and in conflict with the Ninth Circuit, determined that Section 203(o) is an exception to the Fair Labor Standards Act. Pet. App. 18-20. If Section 203(o) is an exception to the FLSA, the employee petitioners must carry burden of proof at trial on the labor/management understandings. On the other hand, if Section 203(o) is an affirmative defense as the Ninth Circuit would have it, the employer respondent must carry the burden of proof at trial on the labor/management understandings.

As a party seeking dismissal based upon the application of an exception to the payment of overtime under the Fair Labor Standards Act, a claim traditionally based upon an affirmative defense, McWane must submit evidence establishing proof of the exemption. *See Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966) ("an employer asserting an affirmative defense to employee wage claims made pursuant to the FLSA

bears the burden of proving its affirmative defense at trial").

In this case, the issue was taken away from the factfinder, on summary judgment. The Court should resolve this split between the circuits, because the undisputed evidence contained in the record on appeal, discussed *supra*, at 6-7, is the same evidence that any set of employee plaintiffs would present at trial in response to a silent collective bargaining agreement. Specifically, that evidence is (1) a failure to pay, (2) a silent collective bargaining agreement, and (3) no discussion of payment among or between the employees and management. If the employer-defendant has no burden to present additional evidence to prove a "custom or practice" at trial, then the employer-defendant will always avoid trial--and judgment—on this issue.

2. The Fifth Circuit's Decision Incorrectly Interpreted Section 203(o) of the FLSA.

The issue of *who carries* the burden at trial, however, does not resolve the larger question of law, of *exactly what* the burden to prove a "custom or pratice" under a bona fide collective bargaining agreement is. Certiorari is therefore also warranted because the Fifth Circuit's decision as to what the test is conflicts with the test stated in this Court's precedent.

a. A Custom or Practice of Nonpayment Was Not Established as a Matter of Law.

The court of appeals' erroneous statement of the law relieves defendants of their obligation to prove knowledge and acquiescence to the alleged custom or practice of nonpayment under a bona fide collective bargaining agreement. McWane cannot unilaterally create circumstances which would entitle it to avoid compensating its employees for hours worked, but that is exactly what the court of appeals has permitted here. The court of appeals' judgment is contrary to prior decisions of this Court in that regard.

The elements necessary to prove such a "custom or practice" under a collective bargaining agreement as a matter of law are (1) time, (2) knowledge, and (3) acquiescence. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969) (*Shore Line*).

> The mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of *time* with the *knowledge* and *acquiescence* of

> the employees to become in reality a part of the actual working conditions.

Id. at 153-154 (emphasis added).

The court of appeals abolished the latter two elements of knowledge and acquiescence for defendants asserting customs or practices of nonpayment under FLSA Section 203(o). Pet. App. at 16-17. Inverting the summary judgment standard, the court of appeals openly *inferred* those elements in favor of the *movant*-defendant, McWane:

> Thus, as long as there was a company policy of non-compensation for time spent changing for a prolonged period of time—*allowing the court to infer that the union had knowledge of and acquiesced to the employer's policy*—and a [collective bargaining agreement] existed, the parties need not have explicitly discussed such compensation when negotiating the [collective bargaining agreement]. McWane "only need prove that the parties had a 'custom or practice' of non-compensation under the agreement."
>
> . . .
>
> It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of noncompensation, we may safely *infer* that McWane's employees had knowledge of and acquiesced to the

> policy of non-compensation. Therefore, we conclude that McWane has demonstrated a "custom" of non-compensation for changing time.

Pet. App. at 17 (emphasis added); *cf.* Rule 56(c), Fed. R. Civ. P. (2006) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor.") and Pet. App. 5 ("Additionally, we construe the FLSA liberally in favor of employees . . . .").

In effect, the court of appeals disregards this Court's legal test in *Shore Line*. Instead, it follows the similarly flawed reasoning in *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001), and *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008). Pet. App. 16. *Anderson* relies entirely on *Turner* for its reasoning. The petition for writ of certiorari in *Anderson* did not challenge the court of appeals' compliance with the *Shore Line* test.

In cases with the same undisputed facts of (1) a failure to pay, (2) a silent collective bargaining agreement, and (3) no discussion of payment among or between the employees and management, at least three district courts have noted that the reasoning in *Turner* does not appear to comport with the *Shore Line* test:

> The Court is unprepared to find that Kerry's six-year history of nonpayment for clothes-changing time, together with

> evidence that the union never complained about such nonpayment, is sufficient to establish, as a matter of law, a "custom or practice" of nonpayment under § 203(o). Indeed, to the extent that the union members never raised the issue even among themselves, this may suggest that they did not knowingly acquiesce in Kerry's policy of nonpayment for clothes-changing time. If an employer's nonpayment for clothes-changing time were sufficient, by itself, to establish a "custom or practice" under § 203(o), then § 203(o) would essentially be an unlimited FLSA exemption applicable to every unionized employer that did not pay for clothes-changing time. The Court does not believe that § 203(o) is so sweeping.

Kassa v. Kerry, Inc., 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007).

> An employer may negotiate away its obligation to pay for donning, doffing and washing time by participating in the collective-bargaining process, but it cannot evade the requirements of the FLSA simply by establishing a history of ignoring them. If it were otherwise, the § 203(o) inquiry would be circular.

Figas v. Horsehead Corp., 2008 WL 4170043 at *15 (W. D. Pa.).

> *Turner* does not support defendant's position, because in *Turner*, although plaintiffs had apparently never raised a particular issue of compensation in formal collective bargaining negotiations, they had raised it in labor management meetings. . . . By contrast, in this case, there is no indication that plaintiffs ever raised the issue of compensation for donning and doffing until after the initiation of this lawsuit. *Defendant cites no binding authority providing that the circumstances presented in this case may establish a custom or practice as a matter of law, rather than simply raising the inference that plaintiffs were ignorant of their potential right to compensation.*

Valladon v. City of Oakland, 2009 WL 3401263 at *11 (N.D.Cal.) (emphasis added).

The only way for employees to waive payment for donning and doffing personal protective equipment is to do so in the manner provided for by law, i.e., by engaging in the labor/management negotiations or understandings authorized by Section 203(o). Yet by abolishing the evidentiary elements of knowledge and acquiescence, and approving the inference of those elements in the movant's favor on summary judgment, the court of appeals permits employers to establish customs or practices of nonpayment unilaterally, merely by refusing to pay for a "prolonged" period of time.

The inferred "evidence" of knowledge and acquiescence in such cases is always the same as it is here: (1) a failure to pay, (2) a silent collective bargaining agreement, and (3) no discussion of payment among or between the employees and management. Pet. App. at 4, 41-43. Indeed, Petitioners' evidence of lack of knowledge and non-acquiescence is the only competent evidence in the record on those elements. *Id.*

The court of appeals, by disregarding this Court's requirement to prove knowledge of and acquiescence to the custom or practice of nonpayment, has already assumed an agreement which the parties never in fact made or intended. And unless reversed, the agreement constructed by the court of appeals binds not only the Petitioners, but every employee of every employer that has not paid for donning and doffing personal protective equipment for a "prolonged" period of time under a silent collective bargaining agreement. Pet. App. 16.

b. The Importance of Section 203(o) to the American Workforce Compels Resolution by this Court.

Certiorari is warranted in light of the broad and important impact Section 203(o) has on workers and employers in large industries across the nation. More than 17 million Americans, both union and non-union members, are represented by unions in their employment. Bureau of Labor Statistics, *Union Members in 2008*, at 5 (Table 1), *available at* http://www.bls.gov/news.release/pdf/union2.pdf (last visited Apr. 7, 2010). Millions of these workers, from

a multitude of occupations ranging from firefighters to textile workers to miners, are required by law to don and doff protective equipment in the course of their regular work process.

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

29 C.F.R. § 1910.132(a) (2009) (OSHA standard).

Given the diversity and number of occupations involving the use of protective equipment, it is no surprise that the Supreme Court has previously been required to address the compensability of donning and doffing time in order to resolve other, related circuit splits under the FLSA. *See IBP v. Alvarez*, 546 U.S. 21 (2005); *Steiner v. Mitchell*, 350 U.S. 247 (1956). The vast numbers of affected employees makes donning and doffing a recurring issue in the lower courts. And the accumulated value of the time makes the compensability of such

time an issue of real importance to employees and employers alike.

Certiorari is especially warranted in light of the impact of this Court's decision upon the thousands of McWane employees who are collectively conditionally entitled to proceed with their FLSA claims against McWane pursuant to 29 U.S.C § 216(b). If the judgment of the court of appeals stands, these potential plaintiffs in a collective action will lose their right to pursue payment for their work.

c. The Scope of What Can Be Bargained For is Relevant to Determining Whether a "Custom or Practice" Exists as a Matter of Law.

The court of appeals assumed knowledge and acquiescence of the union representatives based on the receipt of nonpayment in the wages of individual employees. Pet. App. 17. *Shore Line*, and even the cases relied upon by the court of appeals, make clear that the conduct of individual employees and mere receipt of a paycheck is not the relevant inquiry.

Even if the court of appeals was correct that mere receipt of a paycheck that failed to pay for time spent donning and doffing personal protective equipment could establish knowledge and acquiescence to nonpayment by all employees, which is denied, it throws into sharp relief the court of appeals' underlying flawed premise: That whatever the employees knew and acquiesced to was constant.

In fact, even if it is believed that the employees of McWane in this case knew and acquiesced to a continuous workday that included nothing more than "whistle-to-whistle" time, it seems incongruous to believe that they would maintain that same knowledge and acquiescence in the face of this Court's 2005 holding in *Alvarez* announcing that the scope of the compensable workday had been significantly enlarged to include walking time and other "preliminary and postliminary" activities that, taken together, may have significant value to the employees on a weekly, monthly, and annual basis.

By abolishing two of the three elements of *Shore Line*'s evidentiary test for a "custom or practice," the court of appeals is effectively saying that a molten metal pourer who dons and doffs a hard hat, steel-toed boots, safety glasses, ear plugs, a face shield, gloves, apron, and flame resistant, aluminized clothing and then walks a quarter mile from the plant locker room to her work station and performs other preshift preparation and postshift cleanup activities would acquiesce to nonpayment for all of that time, post-*Alvarez*, as readily as she would acquiesce to nonpayment for ten minutes of clothes changing pre-*Alvarez*.

The court of appeals was wrong to infer, in all cases, that she would, and in so holding, failed to give effect to an intervening decision of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: April 8, 2010

Respectfully submitted,

JIMMY M. NEGEM
NEGEM, BICKHAM & WORTHINGTON
440 South Vine Avenue
Tyler, Texas 75702

DANIEL J. T. SCIANO
Counsel of Record
TINSMAN & SCIANO, INC.
10107 McAllister Freeway
San Antonio, Texas 78216
(210) 225-3121

DAWN B. FINLAYSON
THE GARDNER LAW FIRM, P.C.
745 East Mulberry, Suite 500
San Antonio, Texas 78212

APPENDIX
TABLE OF CONTENTS

Appendix Page

Published Opinion of
The United States Court of Appeals
For The Fifth Circuit
entered January 8, 2010 ..... App. 1

Judgment of
The United States Court of Appeals
For The Fifth Circuit
entered January 8, 2010 ..... App. 22

Judgment of
The United States District Court
For The Eastern District of Texas
entered September 24, 2008 ..... App. 24

Report and Recommendation of
The United States District Court
For The Eastern District of Texas
entered August 25, 2008 ..... App. 26

Exhibit 2 to
Plaintiffs' Response in Opposition to
Defendant's Motion for Summary Judgment
entered September 14, 2007:

Declaration of Dennis W. Jackson
dated September 12, 2007 ..... App. 40

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[ENTERED: JANUARY 8, 2010]

No. 08-41037

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO AGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL,

Plaintiffs-Appellants

v.

MCWANE INC.

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Texas

---

Before JONES, Chief Judge, GARZA and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

This collective action under the Fair Labor Standards Act ("FLSA"), on behalf of hourly employees of McWane, Inc. ("McWane"), sought payment for pre- and post-shift time spent donning and doffing protective gear. The district court granted summary judgment on the basis that at each plant there existed a custom or practice of not compensating pre- or post- shift time spent putting on and taking off protective gear. We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

McWane operates plants that manufacture cast iron pipe and fittings. The hourly employees at McWane's plants wear protective gear while at work, including hard hats, steel-toed boots, safety glasses, and ear plugs. This appeal involves hourly workers at ten McWane plants that operate under collective bargaining agreements ("CBAs"). Different CBAs govern each of the plants, and workers are employed subject to the terms of their respective CBA. Three of the plants operate under CBAs that expressly exclude compensation for pre- and post-shift donning and doffing of protective gear; the other seven CBAs

do not address pre- and post-shift time spent putting on and taking off protective gear.[1]

The workers at the plants are paid by the hour, based on shift or line time. Line time refers to the practice of measuring the shift as starting when the first item hits the processing line and ending as the last item leaves the processing line. None of McWane's employees at these plants have ever received compensation for pre- and post-shift changing time. Union representatives and the employees attest that they were not aware that the pre- and post-shift changing time was potentially compensable under the FLSA. Compensation for such time was never discussed in union meetings or in meetings between union representatives and McWane, including the meetings where the CBAs were negotiated.

Plaintiffs-appellants (collectively, "Allen") filed their collective claim against McWane, on behalf of over 2,100 McWane employees, under 29 U.S.C. §§ 207 and 216(b) of the FLSA. They sought compensation for time spent putting on and taking off gear before and after their scheduled shifts. The

---

[1] Those seven plants whose CBAs do not address compensation for pre- and post-shift donning and doffing are:

(1) Tyler Pipe-Texas (Tyler, TX)
(2) Union Foundry Company (Anniston, AL)
(3) M & H Valve Company (Anniston, AL)
(4) Kennedy Valve Company (Elmira, NY)
(5) McWane Cast Iron Pipe Company (Birmingham, AL)
(6) Clow Valve Company (Oskaloosa, IA)
(7) Clow Water Systems Company (Coshocton, OH)

district court conditionally certified the case as a collective action. McWane moved for summary judgment, and the motion was referred to the magistrate judge. Relying on *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), the magistrate judge recommended that summary judgment should be granted because § 203(o) of the FLSA was applicable. Allen filed objections to the magistrate's recommendations. The district court considered and overruled Allen's objections, adopted the magistrate judge's recommendations, and granted summary judgment in favor of McWane. Allen timely appealed.

II. DISCUSSION

This court reviews a district court's grant of summary judgment *de novo*, applying the same standards as the district court. *McGavock v. City of Water Valley, Miss.*, 452 F.3d 423, 424 (5th Cir. 2006). Summary judgment is warranted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the burden of demonstrating that there are no genuine issues of material fact in dispute. *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 433 (5th Cir. 2005). "This Court resolves any doubts and draws all reasonable inferences in favor of the nonmoving party." *United States ex rel. Longhi v. United States*, 575 F.3d 458, 465 (5th Cir. 2009). "Additionally, we construe the FLSA liberally in favor of employees ..." *McGavock*, 452 F.3d at 424.

This appeal requires construction of § 203(o) of the FLSA, which allows for the exclusion from the computation of hours worked, under certain circumstances, of time spent changing clothes at the beginning or end of each workday. The controlling issue is whether a § 203(o) "custom or practice" of non-compensation for such time existed. In addition, the parties dispute who has the burden of proof under § 203(o) and whether material issues of fact exist.

A. Custom or Practice of Non-Compensation under § 203(o)

"The Fair Labor Standards Act of [1938] establishes the general rule that employees must receive overtime compensation at one and one-half times the regular rate for hours worked in excess of 40 hours during a seven-day workweek." *McGavock*, 452 F.3d at 423-24; 29 U.S.C. § 207(a). Section 207(a) states:

> Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> > (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed

> in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

"Under 29 U.S.C. § 203(o), the time spent changing clothes is to be excluded from the measured working time [for purposes of § 207] if it has been excluded by custom or practice under a bona fide collective-bargaining agreement." *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 479 (5th Cir. 2001); § 203(o). Section 203(o) states:

> Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide

collective-bargaining agreement applicable to the particular employee.[2]

---

[2] The legislative history of § 203(o) is particularly helpful here, as noted by the Eleventh Circuit in *Anderson v. Cagle's*:

> In 1947, approximately nine years after the FLSA was enacted to eliminate "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202 (2000), Congress passed the Portal-to-Portal Act, 29 U.S.C. §§ 251-262 (2000). The Portal-to-Portal Act aimed to countermand judicial interpretations of the FLSA that Congress found to evidence a
>
> > disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others ...; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive

> establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; [and] (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created.
>
> 29 U.S.C. § 251 (2000).

Congress's efforts to curtail employee-protective interpretations of the FLSA continued when the FLSA was amended two years later to add, among other things, what would become § 203(o). As the sponsor of the relevant amendment explained to fellow representatives, the purpose of the amendment was to "avoid [ ] another series of incidents which led to the portal-to-portal legislation." 95 Cong. Rec. 11,433 (daily ed. Aug. 10, 1949) (comments of Rep. Herter). Essentially, he explained, the amendment would strengthen

Allen argues that here the facts do not establish a "custom or practice under a bona fide collective-bargaining agreement" that would make changing time non-compensable.[3] Allen claims that compensation for the pre- and post-shift changing time is a pre-existing right under the FLSA, subject to exclusion only if it has been affirmatively bargained away in CBA negotiations; *i.e.*, negotiation of whether to pay for pre- and post-shift changing time must be shown before the court may conclude that there was a custom or practice as provided in § 203(o). According to Allen, there has been no acquiescence or waiver here because the union representatives did not have knowledge of the right to compensation for this pre- and post-shift changing time, nor any knowledge of or acquiescence to a policy of nonpayment for that time.

---

the employer-protective Portal-to-Portal Act by closing a "loophole" therein. *Id.*

488 F.3d 945, 957-58 (11th Cir. 2007).

[3] In *Bejil v. Ethicon, Inc.*, this Court determined that protective gear constitutes "clothes" under § 203(o). 269 F.3d at 480 n.3. The parties here do not dispute that the term "changing clothes" in § 203(o) includes the putting on and taking off of protective gear. *See also* Dep't of Labor, Wage & Hour Opinion Letter, FLSA2007-10 (May 14, 2007) (stating that "'changing clothes' referred to in section 3(o) applies to putting on and taking off the protective safety equipment typically worn by employees in the meat packing industry."); Dep't of Labor, Wage & Hour Opinion Letter, FLSA2002-2 (June 6, 2002) ("we interpret 'clothes' under section 3(o) to include items worn on the body for covering, protection, or sanitation . . .")

This court addressed a related issue in *Bejil*: whether employees had a right to compensation for changing time where the union and the employer had discussed that very question during CBA negotiations, but the CBA ultimately remained silent on the matter. 269 F.3d at 480. We concluded that such silence in the CBA, after the parties negotiated over the matter, resulted in a "custom or practice" of not compensating the employees for the changing time, and therefore § 203(o) barred claims for back wages for such time. *Id.* Here, unlike in *Bejil*, there was no discussion of whether McWane should compensate the Allen plaintiffs for such clothes changing time.

The Third and Eleventh Circuits have considered the specific question of whether § 203(o) requires the employees and employer to have discussed the issue of compensation for pre- and post-shift changing time, where the CBA is silent on the issue, in order to find that a custom or practice of nonpayment existed pursuant to a CBA. The Third and Eleventh Circuits concluded that it was not necessary for the issue to have been raised in negotiations. *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958-59 (11th Cir. 2007); *Turner v. City of Philadelphia*, 262 F.3d 222, 226 (3d Cir. 2001).

Turner presented the following uncontested facts: (1) Philadelphia had not compensated corrections officers for uniform change time for over 30 years; (2) every CBA between Philadelphia and the officers had been silent as to compensation for change time; (3) the union president proposed at labor management meetings with Philadelphia's

Labor Relations Administrator that change time be made compensable, but the union did not make this request in formal CBA negotiations; (4) the union did, however, ask for and receive a uniform maintenance allowance; and (5) the union never filed a grievance or demanded arbitration based on the non-compensability of change time. *Turner*, 262 F.3d at 225.

The *Turner* plaintiffs made an argument similar to the one articulated by Allen, that "a 'custom or practice' of non-compensability cannot come into being unless (1) the issue of compensability is specifically raised in formal collective bargaining negotiations, and then (2) dropped by the negotiators." *Id.* at 226. Rejecting this approach, the Third Circuit held that the plaintiffs and their union had acquiesced to the municipal government's thirty-year policy of not compensating for changing time. *Id.* at 227. The court explained:

> We think that plaintiffs interpret the phrase "custom or practice under a bona fide collective-bargaining agreement" too narrowly, placing undue emphasis on the clause "under a bona fide collective-bargaining agreement" while virtually reading the clause "custom or practice" out of § 203(o). In essence, plaintiffs construe "custom or practice under a bona fide collective-bargaining agreement" as "custom or practice established through formal collective bargaining negotiations." To the

> contrary, we view the phrase as simply restating the well-established principle of labor law that a particular custom or practice can become an implied term of a labor agreement through a prolonged period of acquiescence.

Id. at 226. The *Turner* court also rejected the argument that the plaintiffs had an antecedent right to payment under the FLSA such that they could not acquiesce to non-compensation without the issue being negotiated, noting that § 203(o) itself defines what work time is encompassed by that right to payment. *Id.* at 226-27.

In *Anderson*, the employer had not compensated the employees for time spent donning and doffing protective gear for approximately ten years. 488 F.3d at 958. Additionally, the court assumed for purposes of its decision that every CBA during the relevant time period had been silent as to compensation for changing time, and assumed that the parties had never discussed the policy. *Id.* at 958. The *Anderson* court followed *Turner*, also rejecting the argument that a custom or practice under § 203(o) cannot exist unless the parties negotiated about the non-compensation policy. *Id.* at 958-59. "Relying again on a common sense understanding of the statute's language, we believe that a policy concerning compensation . . . for clothes changing, written or unwritten, in force or effect at the time a CBA was executed satisfies § 203(o)'s requirement of a 'custom or practice under a bona fide' CBA." *Id.* "Absence of negotiations cannot in this instance equate to ignorance of the policy.

Rather, it demonstrates acquiescence to it." *Id.* at 959.

The Eleventh Circuit noted that the issue in *Anderson* was not controlled by the Fifth Circuit's decision in *Hoover v. Wyandotte Chemicals Corporation*, 455 F.2d 387 (5th Cir. 1972). In *Hoover*, another action to recover overtime pay under the FLSA, this court held that employees were not entitled to additional compensation for the extra eight to ten minutes of clothes changing time that they requested during collective bargaining negotiations, but which was not incorporated into the executed CBA. *Id.* at 388. The custom and practice of the employer for approximately fifteen years had been to pay for fifteen minutes of changing time. During the most recent CBA negotiations, pay for 23-25 minutes of time had been requested but not adopted. *Hoover* held that the request did not change the custom or practice, which was to pay only for fifteen minutes of changing time. *Id.* at 389. Although the employer had agreed to pay for changing time, where the employees raised the issue during CBA negotiations but there was no change in practice by the employer or change to the CBA on the issue, the relevant custom of non-payment for clothes changing time over fifteen minutes remained unaltered.

Allen both criticizes the reasoning of *Turner* and *Anderson* and tries to distinguish them. Allen observes that in *Anderson* the plaintiffs did not contend that they lacked notice of the relevant compensation policy, whereas here the employees and their union representatives were unaware of the

potential for compensation under the FLSA. 488 F.3d at 959. However, neither *Turner* nor *Anderson* address the employees' awareness of the law, much less find it to be a controlling factor in their holding. *Anderson* merely observed that the plaintiffs were aware that the company had a policy of not paying for pre- and post-shift clothes changing time. *Id.* Similar facts were present in *Turner*. 262 F.3d at 225. Both courts concluded that silence by the employees and their union as to the non-compensability of this time when the CBAs were executed meant that a custom or practice of nonpayment was established pursuant to a CBA, and thus the time was not to be calculated as "hours worked" under § 203(o).

Allen relies heavily on the reasoning employed by *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007). In *Kassa*, the defendant moved for summary judgment based on § 203(o). The court voiced its agreement with *Turner*, and determined that § 203(o) may apply even where non-payment for changing time was never raised in negotiations. The court then identified three elements as essential to determine the existence of a "custom or practice" under § 203(o): time, knowledge, and acquiescence. *Id.* at 1070-71 (relying on *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969)). *Kassa* assigned the burden to the defendant to show that "its policy of non-compensation for clothes-changing time lasted for a sufficiently long time, with sufficient knowledge and acquiescence by [the] employees, that the policy became an implicit term—a 'custom or practice'—under the CBA." *Id.* at 1071. In *Kassa*, the record

established that the non-payment by defendant had occurred for six years and the union had never complained about non-payment when executing the CBA. *Id.* The district court found this insufficient as a matter of law to establish a custom or practice, and denied summary judgment.

Allen also relies on the Supreme Court's statement in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981), that "FLSA rights cannot be abridged by contract or otherwise waived . . . ." *Barrentine* addressed whether employees at a union-organized plant operating under a CBA could sue their employer for violations of the minimum wage provisions of the FLSA. The CBA in *Barrentine* required the employees to submit the claim to a grievance committee; when they did so, the committee rejected their claims. The Court held that the right to sue for the violation of the FLSA could not be abridged or waived. *Id.* at 740. There is a significant distinction between the minimum wage provision at issue in *Barrentine* and the application of § 203(o) in the instant case: the FLSA rights at issue in *Barrentine* are independent of the collective bargaining process. *Id.* at 745. By contrast, under § 203(o) the right to be paid for pre- or post-shift changing time may be abridged by contract—a bona fide CBA. *See also Livadas v. Bradshaw*, 512 U.S. 107, 131-32 (1994) (addressing question of meaningful bargaining under the National Labor Relations Act, referring to § 203(o) of the FLSA as an example of a "narrowly drawn opt-out provision," and noting employees have full protection of the minium standard "absent any agreement for something different").

We are persuaded by the reasoning of the Third and Eleventh Circuits, and join them in holding that even when negotiations never included the issue of non-compensation for changing time, a policy of non-compensation for changing time that has been in effect for a prolonged period of time, and that was in effect at the time a CBA was executed, satisfies § 203(o)'s requirement of "a custom or practice under a bona fide" CBA. *See Anderson*, 488 F.3d at 958-59 (policy of non-compensation had been in place for at least ten years); *Turner*, 262 F.3d at 226 (policy of non-compensation had been in place for thirty years). In such instances, regardless of whether the parties negotiated regarding compensation for changing time, acquiescence of the employees may be inferred. By contrast, where there have been no relevant negotiations and the facts do not demonstrate that a policy of non-compensation for changing time has been in effect for a prolonged period of time, other evidence of knowledge and acquiescence by the employees will be required. *See Gatewood v. Koch Foods of Miss.*, 569 F. Supp. 2d 687, 698-700 (S.D. Miss. 2008) (holding that even in the absence of a long-standing tradition of non-compensation or negotiations for compensation of time spent changing clothes, "when employees and union representatives are conclusively aware of the facts surrounding compensation policies for changing clothes at the beginning and end of each workday, and reach an agreement under a CBA that does not compensate employees for the time, a 'practice' exists

under the CBA sufficient to invoke the § 203(o) defense").[4]

Thus, as long as there was a company policy of non-compensation for time spent changing for a prolonged period of time—allowing the court to infer that the union had knowledge of and acquiesced to the employer's policy—and a CBA existed, the parties need not have explicitly discussed such compensation when negotiating the CBA. McWane "only need prove that the parties had a 'custom or practice' of non-compensation under the agreement." *Bejil*, 269 F.3d at 479. It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of non-compensation, we may safely infer that McWane's employees had knowledge of and acquiesced to the policy of non-compensation. Therefore, we conclude that McWane has demonstrated a "custom" of non-compensation for changing time.

---

[4] *Arcadi v. Nestle Food Corp.*, 38 F.3d 672 (2d Cir. 1994) first drew the distinction between those situations requiring evidence of acquiescence—such as th[o]rough negotiations, for example—and those that do not. In *Arcadi*, the Second Circuit distinguished between "custom" and "practice" under § 203(o). *Id.* at 675. "Custom" relates to the past; as in *Turner* and *Anderson*, a court looks for "an ongoing understanding with some continuity." 38 F.3d at 672. Thus, a "custom," in and of itself, demonstrates acquiescence. Regardless of past policies, however, a "practice" can exist if the parties "negotiate over an issue and have an understanding that resolves it" or if there is evidence of an unwritten agreement, even if the issue is not expressly addressed in the CBA. *Id.*

B. Burden of Proof on the Applicability of § 203(o)

Allen urges the court to characterize § 203(o) as an exemption, and argues that the application of an exemption under the FLSA is an affirmative defense for which the defendant has the burden of proof. Allen relies on *Kassa*'s holding that it is the defendant's burden, and on Supreme Court precedent indicating that exemptions are to be narrowly construed against the employer. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Kassa*, 487 F. Supp. 2d at 1071.

The statute, however, demonstrates that § 203 is a list of definitions and subsection (o) addresses how to define and calculate "hours worked," in contrast to § 213, which is titled "Exemptions." 29 U.S.C. § 203(o); *see also Anderson*, 488 F.3d at 957 (noting that § 203 provides a list of definitions, but § 213 is titled "Exemptions," and concluding that § 203(o) is not an affirmative defense); *Turner*, 262 F.3d at 225-26 (plaintiffs had burden of persuasion as to whether or not a custom or practice under § 203(o) existed). In addition, the "exemptions" the Supreme Court refers to as affirmative defenses to the FLSA all "relate[ ] to the total exclusion of a particular worker or workers from certain FLSA protections[,]" not "to the exclusion of only some *activities* from FLSA." *Adams v. United States*, 471 F.3d 1321, 1325-26 (Fed. Cir. 2006).

The only circuit court holding § 203(o) to be an exemption is the Ninth Circuit. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other*

grounds, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (concluding that § 203(o) constitutes an "exemption" from FLSA requirements and is an affirmative defense on which the defendant bears the burden). However, in *Anderson* the Eleventh Circuit persuasively critiqued the Ninth Circuit's characterization of § 203(o) as an exemption. *Anderson*, 488 F. 3d at 957. The *Anderson* court noted that all the cases on which the Ninth Circuit relied concerned § 213 of the FLSA, which is titled "Exemptions." *Id.* The court further observed that "[h]ad Congress sought to bestow upon § 203(o) the same status as the exemptions set forth in § 213, it easily could have amended § 213 instead of § 203, which is titled, not coincidentally, 'Definitions.'" *Id.* Beyond repeating criticism of the reasoning in *Anderson*, Allen does not offer further argument as to why § 203(o) is an affirmative defense allocating the burden of proof to McWane.

Thus, here Allen had the burden of proof as to whether or not a custom or practice under § 203(o) existed. *See Adams*, 471 F.3d at 1326 ("An employee who brings suit . . . for unpaid minimum wages or unpaid overtime compensation . . . has the burden of proving that he performed work for which he was not properly compensated.") (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946)). Once McWane satisfied its summary judgment obligation of showing that Allen had failed to support some essential element of its case, Allen then had the burden of showing that the clothes-changing "does not fall into the set of activities excluded from the definition of" hours worked by section 203(o). *Id.* Although Allen argues that

McWane cannot prevail by merely submitting evidence of the number of years that its policy of non-payment has been in effect, "[s]ince the burden of proof is on [Allen], we reject [the] argument that summary judgment to [McWane] was improper because [McWane] presented minimal evidence." *Id.*

Allen also claims that the declarations presented from employees establish that they did not knowingly acquiesce to a practice of non-payment for changing time, and that those declarations require reversal of summary judgment. The declarations, however, demonstrate only that the employees and their union representatives were unaware of their legal rights under the FLSA—not that they were unaware that they were not being compensated for the time. *See, e.g.*, *Gatewood*, 569 F. Supp. 2d at 701 (when employees and union representatives are "aware of *the facts* surrounding compensation policies for changing clothes . . . a 'practice' exists under the CBA sufficient to invoke the § 203(o) defense.") (emphasis added). While evidence of the employees and their union representatives' ignorance of the fact of non-compensation could create a genuine issue of material fact, no such evidence has been proffered by Allen. The declarations are irrelevant because they do not change the facts established by McWane that (a) McWane did not pay for such time over a prolonged period, allowing an inference of knowledge and acquiescence, and (b) bona fide CBAs existed.

III. CONCLUSION

We adopt the reasoning of the Third and Eleventh Circuits and hold that negotiation is not necessary in order to find that a "custom or practice" exists under § 203(o). We further hold that § 203(o) is not an affirmative defense. Therefore, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[ENTERED: JANUARY 8, 2010]

No. 08-41037

D.C. Docket No. 2:06-CV-158

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO AGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL,

Plaintiffs - Appellants

v.

MCWANE INC,

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Texas, Marshall

Before JONES, Chief Judge, GARZA and STEWART, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

[ENTERED: SEPTEMBER 24, 2008]

CORLINE ALLEN, ET AL.	§	
	§	
v.	§	CIVIL ACTION NO.
	§	2:06-CV-158
MCWANE, INC.	§	

ORDER AND RULE 54(b) JUDGMENT

The above-titled and numbered civil action was heretofore referred to United States Magistrate Judge Chad Everingham pursuant to 28 U.S.C. § 636. The report of the Magistrate Judge, which contains his proposed findings of fact and recommendation for the disposition of the defendant's first motion (#90) for summary judgment, has been presented for consideration. The plaintiffs have filed an objection to Judge Everingham's report and recommendation. The undersigned has reviewed Judge Everingham's report and recommendation and the plaintiffs' objections. The undersigned overrules the plaintiffs' objections and adopts the findings and conclusions contained in Judge Everingham's report and recommendation.

The defendant's first motion for summary judgment (#90) is granted.

The plaintiffs' motion to enter judgment under Rule 54(b) is granted. There is no just reason for delay, and the court renders judgment dismissing all of the opt-in plaintiffs' claims for overtime compensation for time spent donning and doffing protective gear at the beginning and end of the plaintiffs' shifts at the defendant's unionized facilities. The balance of this case is administratively closed. All other pending motions are denied as moot, without prejudice to re-urging should the case be re-opened in the future.

SIGNED this 24th day of September, 2008.

/s/
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

[ENTERED: AUGUST 25, 2008]

CORLINE ALLEN, ET AL.	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	2:06-CV-158
MCWANE, INC.	§	

REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE

1. Introduction

The Fair Labor Standards Act ("FLSA") requires the payment of overtime compensation depending on the number of hours worked by an employee in a workweek. 29 U.S.C. § 207. One provision of the statute excludes from the computation of hours worked any time spent "changing clothes or washing" at the beginning or end of each work day if there exists either (1) express terms excluding such time in a collective bargaining agreement ("CBA") or (2) a custom or practice of non-compensation for such time under the CBA. 29 U.S.C. § 203(o). At issue in the defendant's first motion for summary judgment is whether a custom or practice of non-compensation exists in this case. Based on the summary judgment record, viewed in the light most favorable to the plaintiffs, the court concludes that such a custom or practice exists in this case. As such, the court recommends

the defendant's first motion for summary judgment (#90) be granted.

2. Facts and procedural posture

In this collective action brought under the FLSA, the court previously issued an order conditionally certifying a class of opt-in plaintiffs employed by the defendant. The action presently involves over 2200 plaintiffs from twelve different facilities of the defendant. The relevant time period covered by the certification order is September 11, 2003, to the present. Ten of the twelve facilities are unionized plants, but one such unionized facility had no opt-in plaintiffs who met the class definition. Thus, nine plants are the subject of the present motion.

Each of the defendant's unionized facilities employ hourly workers and operate subject to the terms of a CBA reached between the company and the union representing the hourly workers at each facility. The declarations submitted in support of the motion for summary judgment establish that CBAs are in place at the following facilities operated by the defendant (1) Clow Valve;[1] (2) Clow Water; (3) Kennedy Valve; (4) McWane Cast Iron Pipe Company; (5) M&H Valve Company; (6) Pacific

[1] The defendant's Clow Valve Division operates plants in Oksaloosa, IA, and Corona, CA. Only the Oksaloosa plant is unionized, and as such the employees of the Corona plant are not affected by this motion. Likewise, the defendant's Tyler Pipe Division has plants operating in Tyler, TX, Macungie, PA, and Marshfield, MO. Only the Tyler and Macungie plants are unionized, and as such the employees of the Marshfield plant are not affected by this motion.

States Cast Iron Pipe Company; (7) Tyler Pipe Company-Pennsylvania; (8) Tyler Pipe Company; and (9) Union Foundry Company.

The CBAs in effect in three of the defendant's plants specifically address the issue whether changing clothes is compensable. In each case, the CBAs, which have been in effect since (1) April 1, 2001, at the Tyler Pipe–Pennsylvania Plant; (2) March 26, 2005, at the Pacific States Cast Iron Pipe Company; and (3) July 2, 2006, at the Atlantic States Cast Iron Pipe Company, specifically exclude time spent changing clothes from the computation of hours worked by an employee. Plaintiffs' Response to Motion for Summary Judgment (#100) at 4.

In all of the other facilities, the CBAs are silent on the specific issue whether time spent changing clothes is compensable. It is not disputed, however, that each unionized facility has had a CBA in effect since at least 1997 (and in some cases even longer). It is also not disputed that employees in each unionized facility have not been paid for time

spent donning and doffing protective gear at the beginning and end of their work shifts.[2]

For purposes of this motion for summary judgment, the court accepts as true the statements made by the plaintiffs' witnesses in their declarations in response to the motion for summary judgment. In particular, the plaintiffs have tendered declarations signed by various union representatives and members which state that the respective unions did not know that pre- and post-shift clothes changing involving the donning and doffing of protective gear could be compensable under certain circumstances. Moreover, the court accepts as true the statements made in the declarations that the

---

[2] The plaintiffs have objected to certain portions of the declarations of the various witnesses submitted in support of the defendant's motion for summary judgment. Specifically, the plaintiffs argue that these corporate witnesses do not have personal knowledge of, and therefore are not competent to testify concerning, events that occurred before they began working for the defendant. The court sustains these objections in part. The court finds that these witnesses, in their capacities as human resources/personnel/industrial relations officers, may competently testify as to (1) the dates of the various CBAs at each facility; (2) the contents of those CBAs, and (3) to the best of their knowledge, whether the facilities ever paid wages to the employees for time spent donning and doffing protective gear at the beginning and end of the employees' shifts. The court finds that these witnesses are not competent to testify whether the unions "acquiesced in the practice of non-compensation for such activities throughout the time [they have] represented" the employees. In sustaining this portion of the objection, the court observes that the plaintiffs have offered no evidence which contradicts the dates of the various CBAs, the contents of those CBAs, or whether the plaintiffs were ever compensated for time spent donning and doffing protective gear at the beginning or end of the employees' shifts.

issue of donning and doffing of protective gear was never discussed in union meetings or with management during the negotiations of the respective CBAs. Despite these statements, the court concludes that no genuine issues of material fact exist as to the application of § 203(o) and accordingly recommends that the motion for summary judgment be granted.

3. Summary judgment standard

Summary judgment is proper, pursuant to Rule 56(c), when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant bears the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. How the movant discharges this burden depends on the allocation of the respective burdens of proof. If the issue is one on which the non-movant bears the burden of proof, then the moving party may discharge its burden by pointing to the absence of evidence supporting an element of the non-movant's claim or defense. If the issue is one on which the movant bears the burden of proof, then the movant has an affirmative evidentiary obligation to demonstrate the absence of a genuine issue for trial. *See id.* at 322-24. Once the movant has discharged its summary judgment burden, the burden shifts to the non-movant to demonstrate the existence of a triable issue of fact. *Id.* at 324. In

evaluating the evidence, the court views all of the evidence in the light most favorable to the non-moving party. *Celotex Corp.*, 477 U.S. at 322-24. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citations omitted). Bearing this standard in mind, the court now turns to the issues in the present case.

4. Discussion

The defendant asks for summary judgment with respect to the claims of all plaintiffs working in unionized facilities of the defendant pursuant to section 3(d) of the Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 3(d), 63 Stat. 910, 911 (1949) (codified at 29 U.S.C. § 203(o)(2000)). That statute provides:

> Hours Worked.–In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide

> collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o). The Department of Labor ("DOL") recently issued an opinion confirming that "changing clothes" includes the "putting on and taking off of protective safety equipment typically worn by employees in the meat packing industry." Defendant's Motion for Summary Judgment, Ex. A, at 1. The type of protective safety equipment considered by the DOL included "mesh aprons, sleeves and gloves, plastic belly guards, arm guards and shin guards." *Id.*

In *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008), the court applied § 203(o) to the claims of plaintiffs who sued for overtime compensation for time spent donning and doffing protective gear. The court held that § 203(o)'s "changing clothes" provision covered the donning and doffing of protective gear and that a custom or policy existed at the company which denied compensation for such activity under a collective bargaining agreement. At bottom, the dispute in this case is whether to apply *Anderson* to this case. As such, the court considers closely the facts and holding of that decision.

In *Anderson*, the plaintiffs were production workers in a chicken plant. They sought compensation for the time spent, pre-shift and post-shift, donning and doffing protective clothing that included smocks, hair nets, hearing protection and gloves. *Anderson*, 488 F.3d at 949. The district court noted that some employees were also required to

wear plastic arm guards, steel mesh gloves, bump hats, rain suits, and heavy rubber gloves. *Anderson v. Cagle's Inc.*, No. 1:00-CV-166, slip op. at 10 (M.D. Ga. Dec. 8, 2005). The Eleventh Circuit viewed the protective equipment worn by the employees as "clothing" in view of the DOL's opinion letter and a dictionary, which defined clothing to include "all garments and accessories worn by a person at one time." *Anderson*, 488 F.3d at 955. So viewed, the *Anderson* court concluded that the plaintiffs' protective gear was clothing within the meaning of § 203(o).[3]

Having concluded that the plaintiffs were seeking compensation for "changing clothes" under § 203(o), the Eleventh Circuit then turned to the question whether the plaintiffs' claims were barred because there was a "custom or practice" under a bona fide collective bargaining agreement of not paying employees for time spent changing in and out of protective equipment and clothing. The court considered collective bargaining agreements executed by the union and the employer in 1997, 2000, and 2003, which were in effect during the relevant time period. The plaintiffs in *Anderson* argued that the parties to the CBAs never discussed the issue whether the employees should be compensated for donning and doffing the clothing at issue in the case. As such, the plaintiffs sought to preclude the application of § 203(o) by arguing that "a custom or practice under a collective-bargaining

[3] The Fifth Circuit has held that lab coats, hair covers, facial hair covers and shoes constitute "clothing" within the meaning of § 203(o). *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 479 (5th Cir. 2001).

agreement of not compensating employees for changing clothes or washing cannot arise absent some actual negotiating or agreement between the union and employer on the subject." *Anderson*, 488 F.3d at 958.

The Eleventh Circuit squarely rejected this argument. In reaching its decision, the court assumed that the relevant CBAs never addressed the compensation policy with respect to clothes changing, and that the parties to the relevant CBAs never discussed the policy. *Id.* Nevertheless, the court held:

> relying again on a common sense understanding of the statute's language, we believe that a policy concerning compensation (or noncompensation, as the case maybe) for clothes changing, written or unwritten, in force or effect at the time a CBA was executed satisfies § 203(o)'s requirement of a "custom or practice under a bona fide CBA."

Id. at 958-59.

The court rejected the plaintiffs' position that a custom or policy could not exist absent a history of negotiations between the union and the employer. The court stated that "absence of negotiations cannot in this instance equate to ignorance of the policy. Rather, it demonstrates acquiescence to it." *Id.* at 959. In reaching its conclusion, the court observed that the Third Circuit had reached a consistent

holding in *Turner v. City of Philadelphia*, 262 F.3d 222, 225-27 (3d Cir. 2001)(rejecting the argument that formal collective bargaining negotiations constitute a prerequisite to the application of § 203(o)). Consequently, the court held that the plaintiffs' overtime claims were barred by § 203(o).

The panel in *Anderson* was bound by prior Fifth Circuit precedent on the subject, including *Hoover v. Wyandotte Chems. Corp.*, 455 F.2d 387, 389 (5th Cir. 1972). *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc)(adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981). The plaintiffs in *Anderson* pointed to *Hoover* and urged that *Hoover* required actual negotiations before a custom or practice could exist. The court rejected this reading of *Hoover*, stating that the case simply noted a history of bargaining as evidence of a custom or practice. *Anderson*, 488 F.2d at 959.

In the present case, the plaintiffs concede that the donning and doffing of protective gear constitutes "changing clothes" within the meaning of § 203(o). Plaintiffs' Response to Motion for Summary Judgment, at 4. Thus, the sole issue to be decided is whether a custom or policy of non-payment exists with respect to those plaintiffs covered by CBAs that are silent on the subject of compensation for changing clothes. The plaintiffs argue that *Anderson* is wrongly decided and that the Fifth Circuit requires the union to "affirmatively acquiesce" to the non-payment for changing clothes. In other words, the failure of a CBA to address the issue is not

enough. Under the plaintiffs' theory, the union and the employer must actually raise the issue in negotiations before a custom or practice exists under § 203(o).

The plaintiffs have not cited, and the court's research has not located, any decisions from the Fifth Circuit that deny the application of § 203(o) under the present circumstances. Moreover, the holdings of the Fifth Circuit cases cited by the plaintiffs do not require the union and the employer to discuss a particular issue as a predicate to the application of § 203(o). It is true that in *Hoover* and *Bejil*, the unions representing the plaintiffs affirmatively discussed the compensation policy regarding change time in the collective-bargaining process. *Hoover*, 455 F.3d at 388-89; *Bejil*, 269 F.3d at 479. It is equally true that *Bejil* states:

> In this Circuit, precedent establishes that where the union and employer discuss an issue, the result may be custom or practice, even if the collective bargaining agreement is silent on the issue.

Bejil, 269 F.3d at 479. Nevertheless, the defendant is correct that no case from the Fifth Circuit precludes a finding of custom or practice when the union and the employer never discuss the issue and the CBA is silent on the point.

In *Bejil*, the court was addressing the undisputed facts before it, which reflected that the employer and the union had addressed the issue of

compensation for the time required to don and doff protective covering on several occasions. *Bejil*, 269 F.3d at 479. The court relied on *Hoover* for the proposition that the Fifth Circuit "had found a practice or custom where the employer refused the union's demand to pay for clothes-changing time, and the collective-bargaining agreement did not mention the issue." *Bejil*, 269 F.3d at 480, *citing Hoover v. Wyandotte Chem. Corp.*, 455 F.2d 387, 389 (5th Cir. 1972). Neither *Bejil* nor *Hoover*, however, addressed the issue whether discussion between the union and the employer is a necessary predicate to the application of § 203(o).

The plaintiffs contend that genuine issues of material fact exist because the employees did not know that time spent changing clothes could be compensable under certain circumstances. These facts, however, are not material to the question whether a custom or policy exists under the relevant CBAs. There is no dispute that the employees at the facilities were covered by bona fide CBAs that addressed compensation, albeit not specifically for changing clothes. There is also no dispute that the employees covered by these CBAs were not paid for time spent changing clothes at the beginning or the end of each shift. The fact that the union representatives or employees may have been unaware of their legal right to payment for certain time spent donning and doffing protective gear does not bear on the question whether the employer had a policy of not paying its employees for time spent engaged in such activities. *See Turner*, 262 F.3d at 227 ("The fact that plaintiffs may possess a general, antecedent right under the FLSA to have change

time included in compensable hours worked, therefore, is simply irrelevant to the logically subsequent question whether a 'custom or practice' of non-compensation existed, thereby triggering § 203(o)'s provision mandating that change time covered by that 'custom or practice' be excluded from compensable hours worked.").

The two Circuits that have specifically addressed the issue have held that a showing that a union and the employer affirmatively discussed the change issue in formal collective bargaining negotiations is not required to invoke application of § 203(o). The facts in the present case are identical, in all material respects, to those before the court in *Anderson*. It is significant that the court in *Anderson* was bound by the same Fifth Circuit precedent relied upon by the plaintiffs in this case. The court follows *Anderson* and concludes that no genuine issues of material fact exist on this point. As such, the court recommends that the defendant's first motion for summary judgment (#90) be granted.

5. Conclusion

For the foregoing reasons, the court recommends that the defendant's first motion for summary judgment (#90) be granted. The court also recommends that the plaintiffs' motion to enter judgment under Rule 54(b) (#218) be granted. There is no just reason for delay, and this court recommends the entry of final judgment dismissing all of the opt-in plaintiffs' claims for overtime compensation for time spent donning and doffing protective gear at the beginning and end of the

plaintiffs' shifts at the defendant's unionized facilities. The undersigned further recommends that the balance of the case be administratively closed, and all other pending motions be denied as moot, but without prejudice to re-urging should the case be re-opened in the future.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglas v. United States Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this 25th day of August, 2008.

/s/
CHARLES EVERINGHAM, IV
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

[ENTERED AS EXHIBIT 2 TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT: SEPTEMBER 14, 2007]

CORLINE ALLEN, ET AL.	§
PLAINTIFFS,	§
	§
VS.	§
	§
MCWANE, INC.,	§
DEFENDANT.	§

CIVIL ACTION NO. 2-06CV-158 (TJW)

JURY DEMAND

DECLARATION OF DENNIS W. JACKSON IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 1746, I declare that:

> "My name is Dennis W. Jackson. I am a resident of Anniston, Alabama. I am over the age of twenty-one (21) years, am competent to testify, and state that the following is of my own personal knowledge, true and correct."

"I am employed as a forklift operator for the Defendant, McWane, Inc. at McWane, Inc.'s division, M&H Valve Company, located in Anniston, Alabama. I have been employed at this facility since 1997. Myself and other employees at this facility are, and have been at all relevant times, represented for the purposes of collective bargaining by the Glass, Molders, Pottery, Plastics and Allied Workers International Union (AFL-CIO, CLC) and its Local Union 324, (hereinafter, "the Union"). I am and have been involved in the Union's collective bargaining agreement negotiations for several years and, in fact, took part in and negotiated the collective bargaining agreement which has the effective dates of October 11, 2003 through October 12, 2007."

"Neither I nor any other Union representative has ever raised, during any collective bargaining agreement negotiation or other Union-management meeting, the issue of compensability and/or non-compensability of pre- and post- shift clothes changing involving the donning and doffing of personal protective equipment. McWane corporate representatives have not given notice of same during any collective bargaining agreement negotiation or other Union-management meeting."

"At my facility, employees don and doff required personal protective equipment, which can include: hard hats, earplugs, safety glasses with side shields, prescription safety glasses with side shields, gloves, aprons, rain gear, paper suits, rubber steel-toed boots, steel-toed boots or steel-toed shoes with metatarsal guards, heat jackets, flame-resistant jackets, disposable coveralls, face shields, spats, back braces, wrist braces, aluminized clothing, metatarsal shoes, paper masks, flame retardant hoods, flame retardant sleeves, flame retardant leggings, cutter shirts, respirators, helmets, and chaps. This personal protective equipment is expressly required by McWane, Inc., company policy, procedures and rules and is required by law."

"Prior to this lawsuit, I did not know that pre- and post- shift clothes changing involving the donning and doffing of personal protective equipment was compensable under certain circumstances as provided by law."

"Had I known of that right, and known that McWane was required to pay me for changing clothes involving the donning and doffing of personal protective equipment, I would have raised these issues with management in the collective bargaining agreement

negotiations. In fact, however, I did not know either of these things at the time I participated in negotiating the collective bargaining agreements for my facility and did not raise the issue of compensation for donning and doffing personal protective equipment. At no time was the issue of non-compensation for clothes changing involving the donning and doffing of personal protective equipment discussed, understood or accepted."

"I have read the Declaration of Ray McClay which he signed on August 21, 2007 attached to the Defendant's First Motion for Summary Judgment pursuant to 29 U.S.C. §203(o). Ray McClay did not begin working at M&H Valve Company until the year 2004. The current collective bargaining agreement between the Union and the Defendant McWane, Inc. which I took part in negotiating, became effective on October 11, 2003, before Ray McClay came to work at M&H Valve Company. To my knowledge, Ray McClay had no involvement whatsoever in negotiating the current collective bargaining agreement which has effective dates of October 11, 2003 through October 12, 2007. Because Ray McClay did not come to work at M&H Valve Company until after the current collective bargaining agreement went into effect and had no

> involvement in negotiating the current collective bargaining agreement, I do not believe he could have any personal knowledge of the matters set forth in Paragraphs 8 and 9 of his Declaration."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 9/12/, 2007.

/s/

DENNIS W. JACKSON
PRESIDENT/UNION CHAIRMAN
Glass, Molders, Pottery, Plastics and
Allied Workers International Union
(AFL-CIO, CLC) Local Union 324

163

(2)

No. 09-1218

Supreme Court, U.S.
FILED
JUN 9 - 2010
OFFICE OF THE CLERK

In the

Supreme Court of the United States

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO ARGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS, et al.,

Petitioners,

v.

MCWANE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

GREGORY D. SMITH
Counsel of Record
H. TRACY CRAWFORD
DERON R. DACUS
RAMEY & FLOCK, P.C.
100 East Ferguson, Suite 500
Tyler, Texas 75702
GregS@rameyflock.com
(903) 597-3301
(903) 597-2413 *facsimile*

MITCHELL G. ALLEN
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000
(205) 254-1999 *facsimile*

Counsel for Respondent

CO ★ KLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioner's Questions I and II present any issue meriting review by this Court?

RULE 29.6 STATEMENT

McWane, Inc. has no parent corporation, nor does any publicly traded corporation own ten percent or more of its stock.

TABLE OF CONTENTS

	Page
Rule 29.6 Statement	ii
Statement	1
Reasons for Denying Writ	3
I. The Decision in this Case Embodies No Substantial Conflict, Let Alone a Compelling One	4
A. The Conflict Among Circuits that Allen Postulates is Insubstantial, if Not Illusory	4
B. The Fifth Circuit's Decision Does Not Conflict with any Decision of this Court	7
II. This Court Denied Certiorari in an Almost Identical Case	9
III. Allen's Petition Invokes an Inaccurate View of the Facts	10
IV. This Case Lacks the Procedural Context Necessary for Addressing the Burden of Proof at Trial	11
V. The Courts Below Correctly Decided the Issues	12
Conclusion	15

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Adams v. U.S., 471 F.3d 1321 (Fed. Cir. 2006), *cert. denied*, 552 U.S. 1096, 128 S.Ct. 866, 169 L.Ed.2d 723 (2008) 11

Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003) 4, 5, 6

Anderson v. Cagle's, Inc., 488 F.3d 945 (11th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2902, 171 L.Ed.2d 841 (2008) ..... *passim*

Anderson v. Pilgrim's Pride Corp., 147 F. Supp. 2d 556 (E.D. Tex. 2001) 13

Arcadi v. Nestle Food Corp., 38 F.3d 672 (2d Cir. 1994) 13

Beaulieu v. United States, 497 U.S. 1038, 110 S.Ct. 3302, 111 L.Ed.2d 811 (1990) 7

Bejil v. Ethicon, Inc., 269 F.3d 477 (5th Cir. 2001) 1

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 11

Detroit & Toledo Shore Line Railroad Company v. United Transportation Union, 396 U.S. 142 (1969) 7

IBP, Inc. v. Alvarez, 546 U.S. 21, 126 S.Ct. 514, 1963 L.Ed.2d 288 (2005) 9

McLaughlin v. Nationwide Mut. Ins. Co., 2004 WL 1857112 (D. Or. Aug. 18, 2004) 5

TABLE OF AUTHORITIES – Continued

Page

Peterson v. Smallpass, 683 F.Supp.2d 1107 (D. Or. 2010) 5

Ruppert v. Boehringer Ingelheim Pharmaceuticals, Inc., 585 F.Supp.2d 308 (D. Conn. 2008) 5

Turner v. City of Philadelphia, 262 F.3d 222 (3d Cir. 2001) 2, 6, 12

Weaver v. City & County of San Francisco, 2004 WL 422626 (N.D. Cal., Mar. 4, 2004), *rev'd*, 158 Fed. Appx. 921 (2005) 5

STATE CASE:

Cerrillo v. Esparza, 109 P.3d 475 (Wash. App. 2005), *rev'd*, 142 P.3d 155 (Wash. 2006) 6

RULES, STATUTES AND OTHER AUTHORITIES:

Black's Law Dictionary 347 (5th ed. 1979) 12

Fed. R. Civ. P. 56(e) 11

Oxford English Dictionary 577 (thumb index ed. 1993) 12

29 U.S.C. § 202 (2000) 1

29 U.S.C. § 203(o) ..... *passim*

29 U.S.C. § 213 ..... 13, 14

29 U.S.C. § 213(a)(1) 5, 6

29 U.S.C. § 251 14

STATEMENT

Under 29 U.S.C. § 203(o), the time spent changing clothes "is to be excluded from the measured working time if it has been excluded by custom or practice under a bona fide collective-bargaining agreement." *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 479 (5th Cir. 2001). The legislative history of § 203(o) affords a particularly helpful background here, as noted below and by the Eleventh Circuit in *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957-58 (11th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2902, 171 L.Ed.2d 841 (2008). In 1947, shortly after the FLSA had been enacted to ensure the "well-being of workers," 29 U.S.C. § 202 (2000), Congress passed the Portal-to-Portal Act specifically to countermand judicial interpretations that Congress found to (i) evidence a "disregard of long-established customs, practices, and contracts between employers and employees," and (ii) "creat[e] wholly unexpected liabilities" upon employers. The FLSA was further amended two years later to add what is now § 203(o). The latter amendment was, according to its sponsor, intended to "avoid [] another series of incidents which led to the portal-to-portal legislation." 95 Cong. Rec. 11,433 (daily ed. Aug. 10, 1949) (comment of Rep. Herter). The amendment would, in short, strengthen the employer protective Portal-to-Portal Act. *Id.*

Ignoring this history, Allen would narrowly construct § 203(o). In a nutshell, she claims that

compensation for pre- and post-shift changing time is a pre-existing right under the FLSA, subject to exclusion only if it first has been affirmatively bargained away in union negotiations. According to Allen, moreover, there has been no acquiescence or waiver here – not because the unions did not know of McWane's longstanding policy of compensating employees on a "shift" or "line" time basis, thus excluding pre- and post-shift donning and doffing of basic protective gear – but because the union representatives purport not to have fully appreciated the set of legal rights that the FLSA afforded. Allen is decisively wrong on both accounts, for reasons articulated in the opinion below and earlier stated in decisions by the Third Circuit, in *Turner v. City of Philadelphia*, 262 F.3d 222, 225-26 (3d Cir. 2001), and by the Eleventh Circuit, in *Anderson*, 488 F.3d at 957-58.

Three circuits now have considered the specific question whether § 203(o) requires the employees and employers to have discussed the issue of compensation for pre- and post-shift changing time, where the collective bargaining agreement is silent on the issue, in order to find a custom or practice of nonpayment under a CBA. All three circuits have concluded that such a negotiation requirement would contradict the employer protective purpose of § 203(o). And all three circuits have acknowledged that a longstanding tradition of non-compensation such as McWane's forty-some year policy establishes the necessary custom or

practice. Allen's petition affords no reason to now disturb this consensus of holdings.

REASONS FOR DENYING WRIT

This Court should deny the Petition for Writ of Certiorari for at least the following five reasons:

- The conflicts Allen postulates are neither real nor compelling, but illusory and insubstantial.
- This Court has rejected opportunities to address Allen's positions, denying certiorari in *Anderson v. Cagle's, Inc.*, a quite similar case.
- Allen's petition invokes an inaccurate view of the facts.
- The procedural context would frustrate review: Whereas Allen would have the Court examine the burden of proof at trial, this case presents as a summary-judgment appeal.
- And, finally, § 203(o) was correctly applied below, consistent with fairness principles and the statute's employer-protective purposes.

There thus is no compelling reason to grant the Petition. *See* Sup. Ct. R. 10.

I. The Decision in this Case Embodies No Substantial Conflict, Let Alone a Compelling One.

A. The Conflict Among Circuits that Allen Postulates is Insubstantial, if Not Illusory.

As her first (and presumably strongest) reason for granting certiorari, Allen touts a conflict among the circuits "regarding the burden of proof to establish a 'custom or practice' under a collective bargaining agreement." Pet. at i. Allen's "conflict" does not conceivably embody any substantial dispute such as might afford a compelling reason to grant certiorari. For one thing, the Ninth Circuit's 2003 opinion in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) – the supposedly conflicting decision – said nothing of the burden of proof under § 203(o) but rather determined that the donning and doffing at issue in *Alvarez* was not "changing clothes." *Id.* at 904-05. In explaining that conclusion, the Ninth Circuit cited the non-controversial principle that FLSA *exemptions* are construed narrowly against the employer, via this two-sentence observation:

> FLSA exemptions . . . "are to be narrowly construed against the employers seeking to assert them." [citations omitted] . . . [W]e have also read FLSA exemptions – such as § 3(o) – tightly, refusing to apply FLSA exemptions "except [in contexts] *plainly and unmistakably* within the[ ] [given exemption's]

> terms and spirit." [citations omitted]. *Id.* at 905 (emphasis supplied by the *Alvarez* court).

This brief observation, which is Allen's sole basis for asserting a conflict among circuits, hardly suggests any substantial issue respecting the burden of proof under § 203(o). It is doubtful that the current decision – interpreting the 'custom or practice' proviso of § 203(o) – and the analysis of the Ninth Circuit – addressed to the distinct 'clothes-changing' term – could even be counted as in conflict. In fact, the latter analysis is so tangential to this case that Allen herself never bothered to cite it when urging the court of appeals "to characterize § 203(o) as an exemption" and "affirmative defense." *See* App. at 18 (noting Allen's reliance on the district court ruling in *Kassa v. Kerry, Inc.*). Similarly, the courts citing the Ninth Circuit's *Alvarez* decision (one state court and four federal district courts) do so merely for the generalized proposition that FLSA *exemptions* are construed narrowly.[1]

---

[1] *See Weaver v. City & County of San Francisco*, 2004 WL 422626, *4 (N.D. Cal., Mar. 4, 2004) (applying FLSA's §207 overtime exemption), *rev'd*, 158 Fed. Appx. 921 (2005); *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 585 F.Supp.2d 308, 317 (D. Conn. 2008) (construing "outside salesman" exemptions of FLSA and California Labor Code); *McLaughlin v. Nationwide Mut. Ins. Co.*, 2004 WL 1857112, *2 (D. Or. Aug. 18, 2004) (applying FLSA exemption for persons "employed in a bona fide . . . administrative . . . capacity" 29 U.S.C. §213(a)(1)); *Peterson v. Snodgrass*, 683 F.Supp.2d 1107, 1123 (D. Or. 2010) (applying

(Continued on following page)

Nor is the clothes-changing issue that *Alvarez* addresses otherwise relevant. Both sides in this case agree the donning and doffing of protective gear at McWane's facilities does in fact constitute "changing clothes." *See* Pet. at 6 n. 4.

And while the Fifth Circuit characterizes the quoted sentences from *Alvarez* as "hold[ing] §203(o) to be an exemption," App. at 18, that seems far too charitable in retrospect. In *Alvarez*, the Ninth Circuit appears simply to have *assumed* Section 203(o) to be an exemption, without contemplating any other interpretive possibility or bringing any analysis to bear upon the matter. *See* 339 F.3d at 905.

Perhaps most important, the three courts to address the issue head on, the Third, Fifth and Eleventh Circuits, have all spoken with one voice, concluding that § 203(o) is a definition/exception. *Anderson*, 488 F.3d at 957-58; *Turner*, 262 F.3d at 225-26; App. at 18-20. Given the combined light of these decisions, the possibility that the Ninth Circuit's *Alvarez* decision actually might influence a future court to incorrectly apply § 203(o) is a most unlikely proposition.

FLSA exemption for persons "employed in a bona fide . . . administrative . . . capacity" 29 U.S.C. §213(a)(1); *Cerrillo v Esparza*, 109 P.3d 475, 477 (Wash. App. 2005) (applying Washington Minimum Wage Act), *rev'd*, 142 P.3d 155 (Wash. 2006).

The Court has frequently denied certiorari even in the face of genuine conflict in the Circuits. *See, e.g. Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting) (noting 48 instances where petitions based on circuit splits had been denied in the then-current term). This case, which does not suggest any such conflict, is not worthy of further review.

B. The Fifth Circuit's Decision Does Not Conflict with any Decision of this Court.

While Allen contends that the court of appeals "abolished" the knowledge and acquiescence elements of a custom or practice under a CBA, the court did just the opposite. First it noted with approval that Allen's cited authority, *Kassa v. Kerry, Inc.*, "identified three elements as essential to determine the existence of a 'custom or practice' under § 203(o): time, knowledge, and acquiescence." App. at 14. It further cited this Court's decision in *Detroit & Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142, 154 (1969). *Id.* Then, it explained that a policy of non-compensation for changing time that has been in effect for a prolonged period can of itself establish "that the union had knowledge of and acquiesced to the employer's policy," whereas in the absence of such a policy "other evidence of knowledge and acquiescence by the employees will be

required." App. at 16; *accord* App. at 17 n. 4 (noting that "a 'custom,' [as opposed to a practice] in and of itself, demonstrates acquiescence").

Applying this law, the court then held that the union in this case knew of and acquiesced in McWane's longstanding policy of non-compensation:

> It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of non-compensation, we may safely infer that McWane's employees had knowledge of and acquiesced to the policy of non-compensation. Therefore, we conclude that McWane has demonstrated a 'custom' of non-compensation for changing time. App. at 17.

See also App. at 20 ("While evidence of the employees and their union representatives' ignorance of the fact of non-compensation could create a genuine issue of material fact, no such evidence has been proffered by Allen."). Allen, in contrast, all but ignores Petitioners' knowledge of McWane's policy, choosing instead to highlight their allegedly imperfect knowledge of their FLSA rights. *E.g.*, Pet. at 5 (averring that this Court's decision in *Alvarez* gave Plaintiffs notice that certain preliminary and postliminary activities may be compensable as part of the FLSA continuous workday). Knowledge of the law is not, nor can it be, the standard. To hold otherwise would be tantamount to saying that plaintiffs need not press their rights unless

and until those rights are definitively settled in this Court.

Allen alternately proposes that this Court's own decision in *IBP, Inc. v. Alvarez*, which addressed the contours of the compensable workday, should excuse Petitioners from the consequences of § 203(o). Pet. at 9. In *Alvarez*, however, this Court did not apply § 203(o) but principally determined that time spent by meat packing workers in walking between locker rooms and production lines after donning specialized protective gear was within FLSA compensable time. 546 U.S. 21, 32-33 (2005). That neither interrupts McWane's forty-year custom of nonpayment nor excuses Allen from its consequences.

II. This Court Denied Certiorari in an Almost Identical Case.

This Court has denied certiorari in *Anderson v. Cagle's, Inc.*, an almost identical case. *See Anderson*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2902, 171 L.Ed.2d 841 (2008). Both cases not only litigated claims to be paid for time spent donning and doffing protective clothes but also rejected arguments that a § 203(o) custom or practice could not arise absent express negotiation in collective bargaining. *Id.* at 958-59. Both cases further rejected identical arguments respecting the burden of proof under § 203(o). *Id.* at 957. And both cases were summary-judgment appeals. *See id.* at 949.

In the time since the denial of certiorari in *Anderson*, there has been no change in relevant law. The decision in this case clearly blazes no new analytical trail. Thus there is no reason for now choosing review when it appropriately was withheld in *Anderson*. The petition could and should be denied for this reason alone.

III. Allen's Petition Invokes an Inaccurate View of the Facts.

The hypothetical "molten metal pourer" of Allen's petition (Pet. at 21) is in fact paid for donning and doffing any specialized items of protective gear such as "face shields, aprons and flame-resistant aluminum-clad clothing," as are all other workers whom McWane requires to don and doff such specialized items. *Cf.* Pet. at 5. And as concerns the donning and doffing of basic protective gear (items such as hard hats, safety goggles, gloves and steel-toed boots), the workers and their union representatives always have known that McWane did not compensate this activity and have acquiesced in this policy. *Cf.* Pet. at 12. That the unions and workers had this knowledge is apparent from the nature of shift or line time, precisely as noted in the appellate court's opinion, App. at 3, and never disputed by Allen. What was not known, in contrast, was only whether, but for the § 203(o) exception, the FLSA otherwise would have required McWane to compensate the latter donning and doffing.

IV. This Case Lacks the Procedural Context Necessary for Addressing the Burden of Proof at Trial.

As discussed, Allen principally disputes the burden of proof at trial. Pet. at 11 (arguing that Section 203(o)'s status as an exception or exemption determines whether "the employee petitioners must carry [the] burden of proof at trial on the labor/management understandings"). Had there been any substantial conflict respecting that burden, this summary-judgment appeal would be ill-suited for addressing it.

Once McWane demonstrated its longstanding policy of non-compensation, the burden fell to Allen (both in opposing summary judgment and on appeal) to then demonstrate a genuine issue of material fact as to whether a "custom or practice under a bona fide collective bargaining agreement" existed – regardless who might bear the burden of proof at a conventional trial. Fed R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Adams v. U.S.*, 471 F.3d 1321, 1326 (Fed. Cir. 2006) (FLSA suit; rejecting the argument that summary judgment to the government was improper because the government produced minimal evidence), *cert. denied*, 552 U.S. 1096 (2008). And being as it is "undisputed that McWane has never compensated its employees for changing time, going as far back as 1965," App. at 17, there simply is no room for any genuine issue of material fact as to whether "McWane's employees had knowledge of and acquiesced to the policy of non-compensation." *Id.*

V. The Courts Below Correctly Decided the Issues.

Rather than raise a genuine issue of material fact, Allen proposes that the requisite "custom or practice" be found not to exist absent express negotiation. This interprets the statutory text much too narrowly, to the point of virtually reading the clause 'custom or practice' out of § 203(o). In essence, Allen construes 'custom or practice under a bona fide collective-bargaining agreement' as 'custom or practice established through formal collective bargaining negotiations.' To the contrary, the phrase "simply restat[es] the well-established principle of labor law that a particular custom or practice can become an implied term of a labor agreement through a prolonged period of acquiescence." *Turner*, 262 F.3d at 226, citing *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 153-54, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969).

Upon just such reasoning, the Third, Fifth, and Eleventh Circuits all expressly hold that express negotiation is not necessary in the face of a long-standing policy of non-compensation. *See Turner*, 262 F.3d at 225-26; *Anderson*, 488 F.3d at 958-59, App. at 17. This consensus interpretation comports with common usage of the words 'custom and practice,' which is denoted by "common adoption and acquiescence," Black's Law Dictionary 347 (5th ed. 1979), and rightly encompasses any "habitual or usual practice" or "established usage which by long continuance has acquired the force of law or right." Oxford English

Dictionary 577 (thumb index ed. 1993); *see Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 565 (E.D. Tex. 2001) (employer's "long-standing policy of noncompensation" of itself "constitutes a 'custom' for purposes of § 203(o)") (citing *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 674-75 (2d Cir. 1994)).[7] The consensus interpretation also comports with Congress's intention that § 203(o) would safeguard the fair expectations of employers in respect of employee compensation. *See Anderson*, 488 F.3d at 957-58.

Insofar as the burden of proof at trial is concerned, if that could be relevant in this summary-judgment case, the Fifth Circuit's decision again embodies the consensus view, supported by the statutory text. Section 203(o) "is a list of definitions and subsection (o) addresses how to define and calculate 'hours worked,' in contrast to § 213, which is titled 'Exemptions.'" App. at 18. In contrast, the "exemptions" this Court refers to as affirmative defenses to the FLSA all "relate[ ] to the total exclusion of a particular worker or workers from certain FLSA protections[,]" not "to the exclusion of only some activities from FLSA." *Id.*, quoting *Adams v. United States*, 471 F.3d

---

[7] A "practice," as contrasted from a custom, can sometimes include prospective policies when they are established by express negotiations (as where a provision in a prior collective bargaining agreement affording compensation for change time is deleted from the parties' new CBA). *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 674-75 (2d Cir. 1994).

1321, 1325-26 (Fed. Cir. 2006). And as the Eleventh Circuit has observed, if Congress had wished to enact § 203(o) as an exemption, with the same status as the exemptions in § 213, "it easily could have amended § 213 instead of § 203," which is titled "Definitions." *Anderson*, 488 F.3d at 957.

The decision in this case thus reflects an established and correct understanding of statutory intent. Reversing that decision would induce a most unfair result. As we have stated, through § 203(o) Congress sought to counter those judicial interpretations of the FLSA that had unfairly "disregard[ed] . . . long-established customs, practices, and contracts" thus inviting "windfall payments . . . for activities performed . . . without any expectation of reward beyond that included in their agreed rates of pay." 29 U.S.C. § 251. Allen's campaign to constrict § 203(o), which retroactively would invalidate any custom or practice not expressly bargained for, invites precisely those consequences. Indeed, Allen sets out to topple both sides' legitimate expectations for their collective bargaining agreements – agreements in which McWane's longstanding custom was an implicit term in light of which all other contract provisions were negotiated.

In sum, the parties were always free to negotiate for payment for donning and doffing. But following a decades-old custom, they willingly chose to negotiate respecting other terms.

CONCLUSION

The analysis of the Third, Fifth, and Eleventh Circuits is correct and adequately explained. The questions answered by this consensus of opinion are not close. Because Allen has not established any compelling reason for this Court to act otherwise, the petition for writ of certiorari should be denied.

Respectfully submitted,

GREGORY D. SMITH
Counsel of Record
H. TRACY CRAWFORD
DERON R. DACUS
RAMEY & FLOCK, P.C.
100 East Ferguson, Suite 500
Tyler, Texas 75702
GregS@rameyflock.com
(903) 597-3301
(903) 597-2413 *facsimile*

MITCHELL G. ALLEN
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000
(205) 254-1999 *facsimile*

Counsel for Respondent

164

No. 09-1218

Supreme Court, U.S.
FILED
JUN 23 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO ARGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL.,

Petitioners,

v.

MCWANE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Daniel J.T. Sciano
Counsel of Record
TINSMAN & SCIANO, INC.
10107 McAllister Freeway
San Antonio, Texas 78216
(210) 225-3121
dsciano@tsslawyers.com

Dawn B. Finlayson
THE GARDNER LAW FIRM
745 East Mulberry Avenue
Suite 500
San Antonio, Texas 78212
(210) 733-8191
dbf@tglf.com

Jimmy M. Negem
NEGEM, BICKMAN & WORTHINGTON
440 South Vine Avenue
Tyler, Texas 75702
(903) 595-4466
jimmy@negembickhamlaw.com

Counsel for Petitioners

Dated: June 23, 2010

THE LEX GROUP DC ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

SUMMARY 1

ARGUMENT 3

1. McWane Ignores the Circuit Split Regarding § 203(o) and the Burden of Proof, a Central Issue Before the Court 3

2. This Case Reflects an Extension of the Rule in *Anderson v. Cagle's, Inc.* Beyond its Facts, and Thus Presents Different Issues for Certiorari 6

3. McWane's Brief Contains at Least Two Gross Factual Errors 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Alvarez v. IBP, Inc.,
339 F.3d 894 (9th Cir. 2003) 4

Anderson v. Cagle's Inc.,
488 F.3d 945 (11th Cir. 2007), *cert denied*,
128 S. Ct. 2902 (2008) .....*passim*

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 5

Corline Allen, et al. v. McWane, Inc.,
593 F.3d 449 (5th Cir. 2010) 4

Detroit & Toledo Shore Line R.R. Co. v.
United Transp. Union,
396 U.S. 142 (1969) 2, 5, 8, 11

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005) 5, 10

Transportation Union v.
Union Pacific R. Co.,
385 U.S. 157 (1966) 1

Turner v. City of Philadelphia,
262 F.3d 222 (3d Cir. 2001).....4, 7

STATUTE

29 U.S.C. § 203(o) ..... *passim*

RULE

S. Ct. R. 15.6 1

OTHER AUTHORITIES

Brief in Opposition to Pet. for Certiorari in *Anderson v. Cagle's*, No. 07-910, 2008 WL 378900 (Feb. 7, 2008) 7

U.S. Department of Labor Administrator's Interpretation No. 2010-2, *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.pdf (last visited Jun. 21, 2010) 10

REPLY BRIEF FOR PETITIONER

Petitioners Corline Allen, et al., respectfully submit this Reply to Respondent McWane, Inc.'s Brief in Opposition to Petition for Writ of Certiorari. Rule 15.6, R. Sup.Ct.

SUMMARY

In its Opposition, McWane distorts an aspect of ultimate significance in this case—the law regarding the burden of proof.

The issues raised in the Petition for Writ of Certiorari impact millions of employees working for tens of thousands of employers nationwide. These affected employees and their employers operate pursuant to the terms of collective bargaining agreements ("CBAs"). As this Court has put it, CBAs create the "new common law" at a particular plant or within a particular company. Pet. at 10-11, citing *Transportation Union v. Union Pacific R. Co.*, 385 U.S. 157, 160-161 (1966). An important issue relating to this "new common law," the employer's burden of proof under 29 U.S.C. § 203(o) of a "custom or practice" of excluding payment for clothes changing under the terms of a CBA, is improperly dismissed by McWane in its Opposition. This important issue will be addressed in this Reply.

At stake is whether employers who have entered into a CBA with their employees may avoid the burden of proof requiring them to establish a "custom or practice" under a CBA of nonpayment for clothes changing time. McWane would have the

existence of a custom or practice inferred in favor of the employer on summary judgment—and thus "proven" as a matter of law—based solely upon the existence of a practice of non-payment for clothes changing time, the silence of the employees and the passage of time. However, McWane's purported proof does not meet the evidentiary test for establishing a custom or practice under a CBA articulated by this Court *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969) (*Shore Line*). In *Shore Line*, the three elements of the proof of a "custom or practice" under a CBA were articulated as (1) time, (2) knowledge and (3) acquiescence based on that knowledge. The proof advocated by McWane eviscerates the *Shore Line* elements of (2) knowledge, and (3) acquiescence based on that knowledge. In fact, in the case before the Court, Petitioners introduced undisputed summary judgment evidence affirmatively showing they had no knowledge of a right to pay for pay for clothes changing, they did not bargain the issue in negotiations for their CBAs and they did not acquiesce to non-payment for this time. App. 29-30; App. 43-45. These issues squarely address the evidentiary test set out in *Shore Line*.

In addition, while McWane asserts that a petition for writ of certiorari in an earlier case, *Anderson v. Cagle's*, No. 07-910, was denied for reasons "almost identical" to the matters at issue in this petition, a review of that denial shows that the petition in *Cagle's* addressed issues different from the issues presented here by Petitioners. Indeed, with respect to *Shore Line's* required elements of knowledge and acquiescence based on that

knowledge, the undisputed record in this case contains evidence exactly opposite to the facts of *Cagle's*. In *Cagle's*, the plaintiffs affirmatively discussed the employer's non-payment of time for clothes changing. Here, the parties did not discuss or negotiate payment for this time.

Finally, Petitioners will point the Court to the record to identify untrue facts McWane misrepresented as true in its Opposition argument.

McWane seeks to minimize the significance of this case through its mischaracterizations of important law and fact. Ultimately, McWane's distortions underscore the weakness of its overall argument.

ARGUMENT

1. McWane Ignores the Circuit Split Regarding § 203(o) and the Burden of Proof, a Central Issue Before the Court.

In its Opposition, McWane fails to make any substantive argument relating to the Fifth Circuit's detailed discussion of the circuit split regarding the burden of proof issue and its relevance. McWane also fails to respond to Petitioners' full arguments regarding the proper characterization of § 203(o) as either an exemption from or a definition of the Fair Labor Standards Act. Pet. 11-12. McWane's argument on the burden of proof rests upon a claim that "once [it] demonstrated its longstanding policy of non-compensation, the burden fell to [Petitioners]..." (Brief in Opp. 11), and a contention

that it is "doubtful" that the Circuits are even split on the issue (Brief in Opp. 5). McWane's argument goes no deeper than those two claims.

It must be recognized that the characterization of 29 U.S.C. § 203(o) as either an exemption or definition of the FLSA is outcome determinative in this litigation. On one hand, if § 203(o) is treated as a definition, Petitioners carry the burden of proof. On the other hand, if § 203(o) is treated as an exemption to the FLSA, then McWane carries the burden of proof. The Circuits are split on the issue, with the Ninth Circuit holding § 203(o) is an exemption, and Third, Fifth, and Eleventh Circuits holding § 203(o) is a definition to the Act.[1]

Contrary to the position of McWane, it is clear that the split between the Circuits is a matter of significance. Indeed, this case exemplifies why the two diametrically opposed characterizations of § 203(o) cannot exist simultaneously among the Circuits.

The conflict between the Circuits as to where and how the burden of proof falls—discussed below by the Fifth Circuit for three full pages, App. 18-20—is the *raison d'être* for its erroneous finding that mere inference of knowledge and acquiescence

---

[1] *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003); *Turner v. City of Philadelphia*, 262 F.3d 222, 226-227 (3d Cir. 2001); *Corline Allen, et al. v. McWane, Inc.*, 593 F.3d 449, 458-459 (5th Cir. 2010); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008).

results in a burden against the employer.[2] Whether summary judgment procedure and burden based on inference permit employers to establish customs or practices under CBAs based on time and employee silence alone, in lieu of the *Shore Line* test, is a new, unique and important question deserving of clarification. The need to give effect to intervening cases is also at issue. *E.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

McWane's simple argument on this issue is telling. Consistent with the Fifth Circuit's decision, McWane notes that it established that the parties were basically aware of a time to report to work, and concludes that it therefore, without any additional evidence of knowledge or acquiescence, meets the burden of proof to establish a § 203(o) custom or practice under a CBA for non-payment for clothes changing. In fact, McWane presented no evidence on *Shore Line*'s required elements of time, knowledge, and acquiescence. Instead, McWane merely alleged there was *no evidence to disprove* those elements. That dramatic consequence tells this Court all it needs to know about the significance of interpreting 29 U.S.C. § 203(o) as an exemption,[3] and why the Circuits are and will continue to be divided.

---

[2] It must be noted that the Fifth Circuit's ruling on this issue is in direct conflict with this Court's articulation of the necessary elements in *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969) (*Shore Line*).

[3] FLSA exemptions are to be narrowly construed against the employer, which ought to further foreclose any inference of required elements of proof against the employees on summary judgment. App. 18, *citing Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

2. This Case Reflects an Extension of the Rule in *Anderson v. Cagle's, Inc.* Beyond its Facts, and Thus Presents Different Issues for Certiorari.

McWane also ignores the key distinction between this case and *Anderson v. Cagle's, Inc.*, No. 07-910, where certiorari was denied.

As in *Cagle's*, McWane was permitted to satisfy its burden of proof by putting in no evidence and merely alleging that petitioners had *no evidence to disprove* the elements of time, knowledge, and acquiescence. App. 19. However, in this case, the allocation of the burden of proof was also used to justify summary judgment inferences in the movant, McWane's, favor, on the required elements of knowledge and acquiescence:

> Although Allen argues that McWane cannot prevail by merely submitting evidence of the number of years that its policy of non-payment has been in effect, "[s]ince the burden of proof is on [Allen], we reject [the] argument that summary judgment to [McWane] was improper because [McWane] presented minimal evidence."

App. 19-20.

> It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of noncompensation, we may safely *infer*

> that McWane's employees had knowledge of and acquiesced to the policy of non-compensation. Therefore, we conclude that McWane has demonstrated a "custom" of non-compensation for changing time.

App. 17 (emphasis added).

The Fifth Circuit's inferences in McWane's favor[4] with respect to the required elements of knowledge and acquiescence distinguish this petition from the one denied in *Cagle's*.

In *Cagle's*, the plaintiffs admitted in deposition testimony their awareness of their employer's nonpayment policy and they even discussed it in union meetings.[5] Brief in Opposition to Pet. for Certiorari in No. 07-910 at 7-8, 2008 WL 378900 (Feb. 7, 2008) (quoting deposition testimony). The plaintiffs' own deposition testimony in *Cagle's* thus clearly established the necessary elements of knowledge and acquiescence.

---

[4] The Fifth Circuit had already placed the burden on the petitioners to disprove the elements of knowledge and acquiescence. App. 18-20. After inferences were made in McWane's favor on those elements, there was no evidence that Petitioners could have offered to overcome the adverse inferences.

[5] Similarly, in *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001), it was admitted that the union president "proposed at several labor management meetings with the Commissioner and Deputy Commissioner of Prisons, and with Philadelphia's Labor Relations Administrator, that change time be made compensable." *Id.* at 225.

Consequently, neither the effect of the burden of proof allocation (and thus the conflict between the Circuits regarding the characterization of § 203(o)) nor the conflict with this Court's own test in *Shore Line* were even remotely at issue in the petition for certiorari in *Cagle's*.

Those issues are squarely and cleanly presented here. With respect to *Shore Line*'s required elements of knowledge and acquiescence, the summary judgment record in this case is exactly the opposite of *Cagle's*. Here, Petitioners presented evidence disproving these required elements and, on summary judgment, that evidence must be taken as true. App. 29-30 ("The court accepts as true the statements made in the declarations that the issue of donning and doffing of protective gear was never discussed in union meetings or with management during the negotiations of the respective CBAs"). Petitioners' evidence affirmatively shows they had no knowledge of nor did they acquiesce to a custom or practice of non-payment for time spent in changing clothes. Significantly, this was not the evidence before the Court in *Cagle's*. *See* App. 43-45 ("In fact, however, I did not know either of these things at the time I participated in negotiating the collective bargaining agreements for my facility and did not raise the issue of compensation for donning and doffing personal protective equipment. At no time was the issue of non-compensation for clothes changing involving the donning and doffing of personal protective equipment discussed, understood or accepted.").

3. McWane's Brief Contains at Least Two Gross Factual Errors.

In its Opposition, McWane asserts, without support or citation, that

> The hypothetical "molten metal pourer" of Allen's petition (Pet. at 21) is in fact paid for donning and doffing any specialized items of protective gear such as "face shields, aprons and flame-resistant aluminum-clad clothing," as are all other workers whom McWane requires to don and doff such specialized items.

Brief in Opp. at 10. The opinions of the lower courts and the record materials in Petitioners' Appendix show McWane's assertions to be completely false. Petitioners' claims cover *all* pre- and post-shift donning and doffing of *all* personal protective equipment, *none* of which was compensated by McWane. App. 2 ("sought payment for pre- and post-shift time spent donning and doffing protective gear"); App. 3 ("sought compensation for time spent putting on and taking off gear before and after their scheduled shifts"); App. 25 ("plaintiffs' claims for overtime compensation for time spent donning and doffing protective gear at the beginning and end of the plaintiffs' shifts at the defendant's unionized facilities"); App. 28-29 ("It is also not disputed that employees in each unionized facility have not been paid for time spent donning and doffing protective gear at the beginning and end of their work shifts"); App. 42-43 ("At my facility, employees don and doff

required personal protective equipment, which can include: hard hats, earplugs, safety glasses with side shields, prescription safety glasses with side shields, gloves, aprons, rain gear, paper suits, rubber steel-toed boots, steel-toed boots or steel-toed shoes with metatarsal guards, heat jackets, flame resistant jackets, disposable coveralls, face shields, spats, back braces, wrist braces, aluminized clothing, metatarsal shoes, paper masks, flame retardant hoods, flame retardant sleeves, flame retardant leggings, cutter shirts, respirators, helmets, and chaps. . . . At no time was the issue of non-compensation for clothes changing involving the donning and doffing of personal protective equipment discussed, understood or accepted.").[6]

---

[6] The summary judgment below and this Petition are limited to the issue of the compensability for time spent donning and doffing protective gear. App. 25 (holding limited to "time spent donning and doffing protective gear at the beginning and end of the plaintiffs' shifts at the defendant's unionized facilities"). On June 16, 2010, after the Petition for Writ of Certiorari was filed by Petitioners, the Administrator of the Department of Labor issued an Interpretation which includes in its reasoning a review of the central issue of this Petition. While the Administrator did not specifically provide the Department's position on the issue currently before this Court, in only the second Interpretation issued this year, the Administrator referenced these matters and reinforced the ongoing national significance of compensation for donning and doffing personal protective equipment. U.S. Department of Labor Administrator's Interpretation No. 2010-2, *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.pdf (last visited Jun. 21, 2010). Regardless of compensability, under both the Administrator's Interpretation and this Court's opinion in *IBP, Inc. v. Alvarez*, the donning and doffing of protective gear is a "principal activity" that starts and stops the employee's continuous workday. *Id.* at 4-5

McWane also asserts, again without support, that Petitioners are urging an "express negotiation" requirement or test in order to establish a "custom or practice" under a CBA. Brief in Opp. at 12. Petitioners could not have been more clear that the test is one of time, knowledge, and acquiescence, set out by this Court in *Shore Line*, and that, as in *Cagle's*, those elements may be concretely proven in many ways, other than evidence of express negotiation. Pet. at 13 & 17. Petitioners' point is merely that they must be proven, not hypothesized by McWane or openly inferred by the court of appeals. *Cf.* App. 17.

McWane's disregard for the record pervades its arguments, including (1) its failure to recognize the significance of the conflict among the Circuits regarding § 203(o); and (2) its closely related failure to properly distinguish the petition in *Anderson v. Cagle's, Inc.*, No. 07-910, where knowledge and acquiescence were admitted instead of inferred.[7] These failures are the very matters that illustrate the unique insight and clarity that this Court can provide to employers and employees on important

---

[7] The magistrate also rejected McWane's attempt to present testimony from corporate representatives hypothesizing knowledge and acquiescence on the part of the employees, when those corporate representatives were not even working at the facilities for the relevant years including the CBA negotiations. App. 29 n.2 (sustaining objection) and App. 43-44 (declaration of union representative stating personal knowledge that the McWane corporate representative was not involved in CBA negotiations and did not begin working at the plant until after the most recent CBA had been negotiated and gone into effect).

matters of collective bargaining law which otherwise will go unresolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 23, 2010

Respectfully submitted,

DANIEL J. T. SCIANO
Counsel of Record
TINSMAN & SCIANO, INC.
10107 McAllister Freeway
San Antonio, Texas 78216
(210) 225-3121
dsciano@tsslawyers.com

DAWN B. FINLAYSON
THE GARDNER LAW FIRM
745 East Mulberry
Suite 500
San Antonio, Texas 78212
(210) 733-8191
dbf@tglf.com

JIMMY M. NEGEM
NEGEM, BICKHAM & WORTHINGTON
440 South Vine Avenue
Tyler, Texas 75702
(903) 595-4466
jimmy@negembickhamlaw.com